

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
WILLIAMSPORT DIVISION

THE PENNSYLVANIA STATE : CASE NO.
UNIVERSITY :
v. :
VINTAGE BRAND, LLC, :
SPORTSWEAR INC., d/b/a :
PREP SPORTSWEAR, :
CHAD HARTVIGSON, ERIK :
HARTVIGSON, and :
MICHELLE YOUNG : 4:21-CV-01091

TRANSCRIPT OF PROCEEDINGS
Jury Trial
VOLUME I

Held before the HONORABLE MATTHEW W. BRANN, November 12,
2024, commencing at 10:20 a.m., Courtroom No. 1, Federal
Building, Williamsport, Pennsylvania.

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Proceedings recorded by machine shorthand; transcript produced
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(Proceedings commenced at 10:20 a.m.)

THE COURT: The matter set for trial before this Court today is that of the Pennsylvania State University against Vintage Brand, LLC, Sportswear, Incorporated, doing business as Prep Sportswear and Chad Hartvigson. This matter is docketed before this Court at Civil No. 4:21-CV-01091.

Ladies and gentlemen, as my Courtroom Deputy, Mrs. Rhinehart has indicated, I am Chief United States District Judge Matthew W. Brann. I am a federal trial judge. I was appointed to the bench by the President of the United States and confirmed to this position by the United States Senate under Article III of the United States Constitution to serve during a term of good behavior, which has been interpreted to mean for life.

The Court that I preside over is the United States District Court for the Middle District of Pennsylvania. This federal trial court consists of 33 of the 67 counties of Pennsylvania, and it is divided into three venires, the Scranton division, the Harrisburg division, and the division here in Williamsport.

Let me begin by thanking you for your presence here today and your willingness to serve as jurors in this case. Trial by juries are rights secured by the Seventh Amendment of the Constitution as the cornerstone of our judicial system, and it ensures that all citizens receive a fair trial before a

1 jury of their peers. As has often been observed, service on a
2 jury is one of the highest civic duties in this nation, second
3 only to service in the country's armed forces. The Virginia
4 Declaration of Rights, a document that was drafted in 1776 to
5 proclaim the inherent rights of all men said and would later
6 influence several of this country's founding documents,
7 affirmed that the jury trial is preferable to any other and
8 ought to be held sacred. Your service as prospective jurors
9 makes this system possible. I thank each of you very much for
10 your fulfillment of this fundamental civic duty.

11 At this time, each of you is a member of the
12 venire, meaning the pool from which we will ultimately choose
13 eight people to serve, and only if you are selected from this
14 pool of fellow veniremen to serve on the jury this morning
15 will you technically become a juror. In that process,
16 selecting the eight from the veniremen is known as voir dire.
17 We will turn to that portion of the proceedings at this time.

18 I will now conduct what is known as the voir
19 dire, which is a preliminary examination by the Court of all
20 prospective jurors. Voir dire is a French term, whose rough
21 translation to English means quote, To say what is true, end
22 quote. As the translation implies, your honesty and
23 forthrightness is an absolute requirement throughout the
24 entire voir dire process in order to ensure that this trial
25 will be seen to completion in a lawful and in a legitimate

1 manner, free from any undue influence or impropriety. The
2 purpose of voir dire is to enable both the Court and the
3 attorneys for the parties to determine whether any of you
4 should be excused for cause, meaning that there is some legal
5 reason, such as prior knowledge of the case, familiarity with
6 those involved, or strong feelings about the subject matter
7 which will not allow you to serve as jurors in this case.
8 Voir dire also allows the attorneys for the parties to
9 exercise their individual judgment with respect to preemptory
10 challenges, that is challenges for which no reason need be
11 given.

12 The goal of this process is to obtain a jury that
13 can try the case objectively, based solely on the evidence
14 presented and without influence or bias of any kind.

15 The questions posed to you during this process are
16 not intended to embarrass you, but instead to give the Court
17 and the parties the information necessary to choose a fair and
18 an impartial jury. To protect the integrity of this important
19 process, I ask each of you to listen carefully to all
20 questions and answer each one truthfully and completely.

21 The voir dire process will begin by each of you
22 reading your biography as it is listed on the form that you
23 have. I will then ask some questions of you as a group, and
24 these questions will deal with your familiarity with the
25 parties, the attorneys, and the witnesses, and your views on

1 issues related to the subject matter of this case. If you
2 believe that an answer to a question may raise private or
3 potentially embarrassing matters, please raise your hand and
4 simply ask to speak to me here at the bench. After I have
5 finished my questions, the attorneys for the parties will
6 select those of you who will serve as jurors in this case.

7 (At this time the voir process commenced, which was
8 held off the record.)

9 (11:57 a.m.)

10 THE COURT: All right. We're on the record now in
11 this matter. The parties, through Counsel, have exercised
12 their preemptory challenges. I would like the following
13 veniremen to please stand. No. 1, you are Juror No. 1; No. 3,
14 you are Juror No. 2; No. 7, you are Juror No. 3; No. 8, you
15 are Juror No. 4; No. 12, you are Juror No. 5; No. 14, you are
16 Juror No. 6; No. 15, you are Juror No. 7; No. 18, you are
17 Juror No. 8. Yeah. 17, is Juror No. 8. This is the jury
18 that's selected in this case.

19 The rest of you now are excused. Again, if you've
20 left any personal items in the jury assembly room on the
21 second floor, the Court Security Officers will show you out.
22 You can retire there. Take these personal items with you. If
23 you don't, you are directed to leave now with the thanks of
24 the Court. I realize many of you have driven some distance to
25 be here. As I said to those individuals who were excused for

1 charge, this is Federal Court, not County Court. So some of
2 you have driven two or two-and-a-half hours to come here.

3 Is there anyone here from Emporium? There's
4 usually somebody from Cameron County. Somebody from
5 Shinglehouse? Ulysses? Coudersport? Yes. I know where you
6 are. I've driven to all these places. It's not next door, is
7 it, sir? No, it is not. So again, thank you very much for
8 your service here today. You're excused with the thanks of
9 the Court. You may depart.

10 Those of who you have been selected as the jurors,
11 please remain where you are for the moment.

12 (At 11:59 a.m., the veniremen were excused.)

13 THE COURT: Counsel, be seated. Thank you.

14 Mrs. Rhinehart, swear in the jury, please.

15 (The jury impaneled in this case was sworn.)

16 THE COURT: Members of the jury, now that you have
17 been sworn, I'm going to give you some preliminary
18 instructions that should serve as guidance throughout this
19 trial. Trial will begin this afternoon and will go on until
20 probably Friday, November 22nd, 2024 at the latest. As I
21 stated earlier, we will attempt to begin promptly at 9:30 a.m.
22 each morning. We will end at approximately 5:30 p.m. each
23 day. We will try to break for lunch at approximately 12 to
24 12:30 each day. You'll be given approximately one hour for
25 lunch. I will also endeavor to take routine breaks throughout

1 the day to give you a chance to use the restrooms and to
2 stretch your legs. If, however, you absolutely require a
3 break at another time, please let one of my staff know.

4 Now a few words about your conduct as jurors.
5 First, I instruct you that during the trial and until the time
6 you retire to deliberate, you are not -- you are not to
7 discuss this case with anyone, not even amongst yourselves. I
8 know that many of you use cell phones, smart phones, like
9 Samsung Galaxy and iPhones and other portable electronic
10 devices, lap tops, net books, and other computers, both
11 portable and fixed, and other tools of technology to access
12 the Internet and to communicate with others. You must not
13 talk with anyone about this case or use these tools to
14 communicate electronically with anyone about the case. This
15 includes your family and friends.

16 You may not communicate with anyone about this case
17 on your cell phone, through e-mail, iPhone, text message, or
18 on Twitter, through any blog or website, through any Internet
19 chatroom, or by any other way of social networking websites,
20 including, but not limited to Twitter, now known as X,
21 Facebook, LinkedIn, Instagram, SnapChat, TikTok or YouTube.
22 This means you should not talk about the case with anyone and
23 you should not communicate with anyone about this case in any
24 other manner, such as by e-mail or text message.

25 It is very important that you do not discuss the

1 case amongst yourselves until the end of the trial when you
2 retire to the jury room to deliberate. You need to allow each
3 juror the opportunity to keep an open mind throughout the
4 entire trial. During the trial you may talk with your fellow
5 jurors about anything else of a personal nature or comment
6 interest but not about the trial. And also, you may tell your
7 family and friends that you have been selected to be a juror
8 in Federal Court, how long the jury -- excuse me -- how long
9 the trial is expected to last, but that I have instructed you
10 not to talk any more about the case, and they should not talk
11 to you about it either.

12 The attorneys, parties, and witnesses are also not
13 permitted to talk to you about the case. So if any attorney,
14 party, or witness does not speak to you when you pass in the
15 hall, ride in the elevator or like, remember it is not because
16 they are being rude. It is simply because they are not
17 supposed to talk or visit with you either. This is why it is
18 important that you wear your juror tags. It shows that you
19 are someone who is not to be approached in any way. If anyone
20 should try to talk to you about the case, including a fellow
21 juror, bring it to my attention immediately by telling my
22 courtroom deputy, Mrs. Rhinehart.

23 Second, do not read or listen to any anything
24 related to this case that is not admitted in to evidence. By
25 way of example, if there is a newspaper article or radio or

1 television report relating to this case, do not read the
2 article or watch or listen to the report.

3 In addition, do not try to do any independent
4 research or investigation on your own related to this case,
5 the matters in this case, or the individuals involved in this
6 case. This means, by way of example, that you must not visit
7 the scene, conduct experiments, consult reference works or
8 dictionaries or search the Internet, websites, or blogs for
9 any additional information or use a computer, cellular phone,
10 or other electronic devise or tool of technology or any other
11 method to obtain information about this case, this type of
12 case, the parties in this case, or anyone involved in this
13 case. You must decide this case based only on the evidence
14 presented in this courtroom and my instructions about the law.
15 It would be improper for you to try to supplement that
16 information on your own.

17 Do not reach any conclusion in this case until all
18 of the evidence is in. Keep an open mind. Do not make up
19 your mind about the verdict until you have heard all of the
20 evidence and I have given you final instructions about the law
21 at the end of the trial and you have discussed this case with
22 your fellow jurors during your deliberations.

23 You should also not concern yourself with -- strike
24 that. Finally, you will be allowed to take notes during this
25 trial. My Courtroom Deputy, Mrs. Rhinehart, will arrange for

1 pens and paper, and while you are permitted to take notes, you
2 are not required to do so. How many notes you take, if any,
3 is entirely up to you. If you do not choose to take notes,
4 keep the following -- if you do choose to take notes, keep the
5 following points in mind:

6 First, do not allow note-taking to distract you
7 from your task as jurors. You must listen carefully to all of
8 the testimony and decide whether and how much to believe each
9 witness. This will require you to watch the appearance and
10 the behavior of the witness while he or she is testifying. It
11 may be difficult to take detailed notes and pay attention to
12 what the witnesses are saying at the same time.

13 Second, be brief. Do not try to write down
14 everything that is said and do not try to summarize all of the
15 evidence. Your notes are not a transcript. Make sure that
16 your note-taking does not interfere with your listening to and
17 understanding and considering all of the evidence.

18 Third, remember that your notes are not evidence.
19 They're merely a way to refresh your memory of the evidence.
20 You should rely on your memory in reaching a decision in this
21 case. Do not give more or less weight to the views of a
22 fellow juror just because that juror did or did not take
23 notes.

24 Finally, if you do take notes, keep them to
25 yourself until the end of the trial when you and your fellow

1 jurors go to the jury room to deliberate. Be sure to take
2 your notes with you each time you leave the courtroom. Please
3 leave them in the jury room when you leave at night. After
4 the conclusion of the case, the Court officer will collect and
5 destroy them to protect the secrecy of your deliberations.

6 Now a few words about your job as jurors and my job
7 as the judge.

8 You have two main duties as jurors. Your first
9 duty is to decide what the facts are based on the evidence.
10 You and you alone are the judges of the facts. You will have
11 to decide what happened. I play no role in judging the facts.

12 Your second duty will be to apply the facts to the
13 law that I will give to you. My role is to be the judge of
14 the law. I will make whatever legal decisions have to be made
15 during the course of the trial, and at the end of the trial, I
16 will explain to you the law which you must apply in reaching
17 your decision in this case. You must follow the law,
18 regardless with whether you agree with it or not. However,
19 you should not take anything I may do or say during the trial
20 as indicating what I think of the evidence or what your
21 verdict should be.

22 Let me talk to you about evidence, and I'll define
23 it for. You must make your decision in this case based only
24 on the evidence that you see and hear in court. Do not let
25 rumors, suspicions, or anything else that you may have seen or

1 heard outside of court influence your decision in any way.
2 The evidence upon which you may base your decision includes
3 only the following: One, the testimony of the witnesses, that
4 is what the witnesses say when they are testifying under oath.
5 Two, the documents and other things admitted as exhibits.
6 Three, any facts to which the parties agree. And four, any
7 facts that are judicially-noticed, that is to say facts that I
8 say you must accept as true. You should base your decision
9 only on such evidence.

10 Certain things are not evidence and must not be
11 considered. Statements, arguments, and questions by lawyers
12 are not evidence. Objections by lawyers are also not
13 evidence. There are rules that control what can be received
14 into evidence, and lawyers have an obligation to make an
15 objection when they believe a question or an exhibit is not
16 permitted by those rules. However, the objection is simply a
17 request that I make a decision on a particular rule of
18 evidence. You should not be influenced by the fact that an
19 objection was made or by my ruling on it. If an objection is
20 sustained, simply ignore the question. Do not speculate about
21 what a witness might have said or what an exhibit might have
22 shown. If an objection is overruled, treat the answer or the
23 exhibit like any other. I may also instruct you that some
24 item of evidence should be considered only for a limited
25 purpose, and you must follow that instruction.

1 Also, certain evidence may be excluded or struck
2 from the record, and I will instruct you to disregard this
3 evidence, and you must not consider any evidence or testimony
4 that is struck or excluded.

5 At times during the trial, it may be necessary for
6 me to talk with the attorneys here at the bench. This is
7 called a sidebar or a bench conference. During a sidebar, you
8 will hear a white noise play over the jury box. You should
9 not be able to hear the discussion here at the bench. If you
10 are able to hear any of the sidebars, please let my Courtroom
11 Deputy, Mrs. Rhinehart know. The purpose of these conferences
12 is not to keep important information from you. But rather to
13 allow me to discuss with the attorneys any objections to
14 evidence, and to be sure that the evidence is presented to you
15 correctly under the rules.

16 Sometimes a lawyer may request a sidebar and I may
17 not always grant that attorney's request. Do not consider my
18 granting or denying a request for a conference as suggesting
19 my opinion of the case or what your verdict should be.

20 And finally, anything you may see or hear about
21 this case outside of the courtroom is not evidence and must be
22 disregarded. You must decide this case based only on the
23 evidence presented here in court, as I've noted.

24 Let me talk to you now about direct and
25 circumstantial evidence. You'll be presented with two types

1 of evidence in this trial, direct evidence and circumstantial
2 or indirect evidence. Direct evidence is simply evidence
3 which, if believed, directly proves a fact. For example, a
4 witness may testify that he saw it raining outside.

5 Circumstantial evidence is evidence which, if
6 believed, indirectly proves a fact. By way of example, if
7 someone walked into the courtroom wearing a wet raincoat and
8 carrying a wet umbrella, that would be circumstantial or
9 indirect evidence from which you could reasonably conclude
10 that it was raining. You should consider all of the evidence
11 presented in this case, both direct and circumstantial. The
12 law makes no distinction between the weight that you should
13 give to either type.

14 In weighing the evidence, you should use your
15 common sense. Consider it in light of your everyday
16 experience with people and events, and give it whatever weight
17 you believe it deserves. If your experience tells that you
18 certain evidence reasonably leads to a conclusion, you are
19 free to reach that conclusion. It will up to you to decide
20 what testimony you believe and testimony you do not believe.
21 You are the sole judges of the credibility of the witnesses.
22 The credibility means whether a witness is worthy of belief.
23 You may believe everything a witness says, only part of it, or
24 none of it. In deciding what to believe you may consider a
25 number of factors, including the following:

1 One, the opportunity and ability of the witness to
2 see, or hear, or know the things the witness testifies to;
3 two, the quality of the witness's understanding and memory;
4 three, the witness's manner while testifying; four, whether
5 the witness has an interest in the outcome of the case or any
6 motive, bias, or prejudice; five, whether the witness
7 contradicted -- excuse me -- whether the witness is
8 contradicted by anything the witness said or wrote before
9 trial or by other evidence; six, how reasonable the witness's
10 testimony is when considered in light of other evidence that
11 you believe; and seven, any other factors that bear on
12 believability.

13 This is a civil case, as I have noted. The
14 Plaintiff, the party who brought this lawsuit is the
15 Pennsylvania State University. The Defendants are the parties
16 against whom this lawsuit are filed is Vintage Brand, LLC,
17 Sportswear, Incorporated, and Chad Hartvigson. In this case,
18 the Plaintiff must prove its claims by a standard called
19 preponderance of the evidence. This means that the
20 Pennsylvania State University has to prove to you that what it
21 claims is more likely so than not so. To put it differently,
22 if you put the evidence favorable to the Plaintiff, Penn
23 State, on one side of the scale and the evidence favorable to
24 the Defendant, Vintage Brand, on the opposite side of the
25 scale, the Plaintiff would have to make the scale tip somewhat

1 on its side. If Pennsylvania State Univeristy fails to meet
2 this burden, your verdict must be, then, for the Defendants.

3 You may have heard of the phrase proof beyond a
4 reasonable doubt. That is a stricter standard of proof that
5 applies only in criminal cases. It does not apply in civil
6 cases such as this one. You should put anything you may have
7 heard about the reasonable doubt standard out of your mind and
8 apply only the preponderance of the evidence standard which I
9 have just explained to you.

10 Shortly after lunch we will begin the trial.
11 First, each side may make an opening statement. What is said
12 in the opening statement again is not evidence but is simply
13 an outline to help you understand what each party expects the
14 evidence to show. After the attorneys have made their opening
15 statements, each party is given the opportunity to present its
16 evidence.

17 The Plaintiffs' Counsel will present witnesses and
18 evidence first, because the Plaintiff has the burden of proof,
19 and the attorneys for the Defendants will have the opportunity
20 to cross-examine those witnesses. Following the Plaintiff's
21 case, the Defendants' attorney may present witnesses and
22 evidence, and the Plaintiff's Counsel will have the chance to
23 cross-examine these witnesses.

24 After all the evidence has been presented, the
25 attorneys will present to you closing arguments that will

1 summarize and interpret the evidence. And as with closing --
2 excuse me -- as with opening statements, closing arguments are
3 not, themselves, evidence. After you've heard closing
4 arguments, I will give you final instructions concerning the
5 law that you must apply to this case.

6 And finally, after my instructions on the law, you
7 will retire to consider your verdict. Your deliberations are
8 secret. You will not be required to explain your verdict to
9 anyone. You must reach a unanimous verdict, which means that
10 each of you must agree to it. Remember to keep an open mind
11 during this trial. Do not make up your mind about any of the
12 questions in this case until you have heard each piece of
13 evidence, and all of the law, which you must apply. In other
14 words, do not come to a decision until the end of the trial at
15 which point you will begin your deliberations.

16 All right. Well, we are right at the noon hour, a
17 perfect place, I think, to end for the moment. And so I'm
18 going to stand -- have you stand in recess for about an hour
19 for lunch.

20 I am not a shill for Wegman's grocery store. But,
21 you will note that there is a Wegman's grocery store here in
22 town directly across Third Street. I would commend their food
23 court to you. Yes, I know full-well that it's overpriced. I
24 eat there regularly. That's not lost on me. But you can get
25 a reasonable variety of things to eat, and a number of the

1 restaurants in town are open, starting today, on Tuesday.
2 They will not be open on Monday, typically. You're welcome to
3 explore that. But again, the food court is an easy and, for
4 the most part, a fairly economical place to eat.

5 We'll stand in recess for an hour, until about
6 1:15 p.m. I would like you back in the building, maybe 10
7 minutes before that, 5 minutes before that. You're going to
8 report to the jury assembly room where you were first thing
9 this morning on the second floor. The Court Security Officer
10 will show you up. There will be -- someone from the staff
11 will be waiting there. And we'll try to get under way here at
12 about 1:15.

13 So report to the jury assembly room on the second
14 floor. Mrs. Rhinehart, Mrs. Reynolds or someone else from the
15 staff will bring up to the jury room. Mrs. Rhinehart is going
16 to show you the jury room now, and we'll stand in recess at
17 this time. Please don't discuss the case -- I don't believe
18 there's anything to discuss -- with your fellow jurors. Find
19 some other topic to talk about. And we'll you in about an
20 hour. Escort the jury out, please.

21 (At 12:18 p.m., the jury left the courtroom for
22 their lunch recess.)

23 THE COURT: Be seated.

24 All right. We're back on the record now outside
25 the presence of the jury. I believe there were some issues,

1 Counsel, that you wanted to discuss with me that principally
2 relate to the charge. So I'm going to make these rulings.
3 I've looked over everything that you've submitted the last
4 couple of days in terms of papers. I don't think I need any
5 additional argument on this. I heard a little bit of argument
6 this morning.

7 Again, I've already started to work on the jury
8 charge. That will, of course, be modified, as you'd expect,
9 during the course of the trial based on the evidence and the
10 testimony presented. But there seem to be four issues that
11 have come up as to these instructions, and let's discuss those
12 and I'll give you some orientation of my thinking on these
13 issues at this time.

14 First, there appears to be a dispute over Vintage
15 Brand's proposed nominative fair use instruction,
16 specifically, whether Vintage Brand may even present such a
17 defense.

18 Pennsylvania State University asserts that the only
19 fair use defense asserted in the Defendants' answers was a
20 classic fair use defense. And I agree that it appears that
21 the ninth affirmative defense is a classic fair use offense.
22 Am I missing something? And if not, why, Vintage Brand,
23 should I not, then, conclude, Mr. Feters, that you have
24 waived the affirmative defense of nominal fair use? Afterall,
25 this Circuit, the United States Court of Appeals for the Third

1 Circuit, has repeatedly stated that, quote, Failure to raise
2 an affirmative defense by responsive pleading or by
3 appropriate motion generally results in the waiver of that
4 defense, end quote.

5 And I am citing from, as you would expect to know,
6 Elliott, E-l-l-i-o-t-t and Frantz, F-r-a-n-t-z, Incorporated
7 against Ingersoll Rand Company, found at 457, F3d, 312,
8 specifically at page 321, a decision of our Court of Appeals
9 from 2006.

10 MR. FETTERS: Your Honor, if I may defer to my
11 colleague, Mr. McKenna?

12 THE COURT: Mr. McKenna?

13 MR. MCKENNA: Thank you, Your Honor. So I think
14 the starting point here is that the Plaintiffs claim -- the
15 nature of Plaintiffs' claim, and specifically what it has
16 charged to be the infringement, has been a moving target
17 throughout this entire case. So it still remains unclear,
18 actually, which images on any of the shirts Penn State accuses
19 of being infringing.

20 The emphasis on the website was a much later
21 development in the case. As Your Honor remembers on summary
22 judgment, that question arose. You asked for supplemental
23 briefing on the question because it was clearly being argued
24 at that time. So Penn State's been on notice or quite a long
25 time that nominative fair use was the argument that Vintage

1 Brand was making with respect, specifically, to the website
2 uses. Early in the argument that Penn State was making, it
3 was pretty clear that the accused infringement was referring
4 specifically to the -- to the products, not to the uses on the
5 website. Uses on the website were just the context in which
6 those things were being sold.

7 Later, in their more recent things, they have now
8 started to make it clear that they apparently also allege that
9 the uses on the website are separately infringing. And of
10 course our argument has always been, was on summary judgment,
11 was on the supplemental briefing, that if the -- if the
12 products themselves are legal to sell, then it is legitimate
13 for Vintage Brand to sell them on the website and to refer to
14 them by name, which is what the Nominative Fair Use Doctrine
15 is. So I think that doctrine has been in the case for quite a
16 long time. They've been on notice of it insofar as their
17 claim refers to the website text in particular, which again,
18 has been a moving target. I think it's been pretty clear that
19 Nominative Fair Use has been Vintage Brand's defense to that.

20 THE COURT: Who is going to speak for Penn State?
21 Ms. Wheatley?

22 MS. WHEATLEY: I will, Your Honor.

23 THE COURT: Go ahead.

24 MS. WHEATLEY: The Defendants' infringement on the
25 website was alleged in Penn State's Complaint, so Defendants

1 had the opportunity at that point to assert a Nominative Fair
2 Use in their defense. As Your Honor noted, they asserted a
3 classic fair use defense. They did not assert Nominative Fair
4 Use. This has been clear from the beginning. The website was
5 pictured in the Complaint. We discussed Defendants'
6 advertising. We separated out both the goods and the way they
7 called it a Penn State Nittany Lion's store. And raising it
8 in summary judgment does not resolve the deficiency of not
9 raising it in the pleading.

10 After that, discovery was closed, and the
11 opportunity to depose witnesses on this issue was -- had
12 ended.

13 THE COURT: Okay. I understand. I'll take it
14 under advisement. You'll have a ruling in due course.

15 So second, as you all well remember, I think there
16 was a dispute in the Motions In Limine about whether Vintage
17 Brand can present a defense related to anti-trust law. I held
18 that the Defendants may present such a defense. I was
19 initially going to ask Counsel for Vintage Brand why no
20 instructions were submitted in relation to that defense, but,
21 in Penn State's filings on Friday evening and again on
22 Saturday afternoon, they stated that Vintage Brand does not
23 intend to pursue such a defense.

24 Of course my decision on the Motion In Limine
25 permitting evidence of anti-trust concerns was premised

1 entirely on the viability of that defense. So absence the
2 defense, it seems to me that evidence is now irrelevant in
3 this case. So why should I not prohibit the introduction of
4 evidence related to the anti-trust issues? Who is going to
5 speak to that for Vintage Brand? Mr. McKenna? Mr. Feters?

6 MR. FETERS: Your Honor, we think it's fairly
7 assumed within the topic of aesthetic functionality, meaning
8 that if these designs and logos on Vintage Brand's products
9 are not functioning to indicate to consumers who is
10 responsible for the quality of the products, then the
11 alternative is that Penn State is asserting these claims to
12 control the market for any images that cause the consumers
13 simply to think and evoke thoughts of the University.

14 And so while we have no intention of explicitly
15 making arguments, introducing evidence of conspiracy to
16 restrain trade, things like that, we think that it should be
17 fairly allowed that we make arguments to -- similar to what I
18 just expressed, that Penn State is bringing this claim not
19 because consumers are confused as to the source of Vintage
20 Brand's products, but because they want to control the market
21 of any imagery or any products that simply evoke thoughts of
22 the University, which is the per se model that has been
23 discussed in the briefing and in your Court's orders.

24 THE COURT: Who is going to speak for Penn State?
25 Mr. Finkelson, go ahead.

1 MR. FINKELSON: I will, Your Honor. Dave
2 Finkelson. Control the market is the language of anti-trust.
3 Your Honor allowed them to proceed with an anti-trust defense
4 in the Motion In Limine ruling. They had communicated to us,
5 and we had communicated, frankly, prior to that ruling that
6 they were no longer asserting it as a defense. They
7 reaffirmed that after the fact of Your Honor's ruling. They
8 do not have an anti-trust defense.

9 Evidence about controlling the market or
10 anti-competitive behaviors or suggestions is irrelevant under
11 Rule 402, highly prejudicial under Rule 403, and under those
12 and every other Rule of Evidence have zero relationship to
13 aesthetic functionality under any articulation, whether the
14 Defendants' articulation or our articulation.

15 So we think that evidence is highly inflammatory.
16 The Defendants can tell their story without any nod to
17 anti-competitiveness, any nod to monopolization, any nod to
18 controlling the market, and we would ask that any such
19 evidence and argument be excluded.

20 THE COURT: Good. I'll take that under advisement,
21 as well.

22 Third, there appears to be a dispute about
23 instructions for contributory infringement. Penn State
24 objects to any such instruction because it asserts its claims
25 against Sportswear are for direct infringement, not

1 contributory infringement. Starting with Defense Counsel, do
2 you care to speak, perhaps, to that issue, and, in particular,
3 Penn State's assertion that contributory liability is not an
4 issue in this case. Does Vintage Brand agree, in light of
5 that statement, that a contributory liability instruction is
6 not appropriate?

7 MR. HARMS: Yes, Your Honor. Penn State hasn't
8 pleaded facts supporting direct infringement against
9 Sportswear. The only reason Sportswear is part of this
10 lawsuit is because it contributed to the alleged infringement.
11 The only theory that makes sense under the paradigm pled in
12 this case, and Penn State's offered pleading, is a
13 contributory infringement allegation, is a liability for
14 contributory infringement.

15 So per the pleadings, we don't believe that there's
16 a direct claim against Sportswear for infringement, which is
17 why we believe it to be appropriate to instruct the jury in
18 that regard.

19 MS. WHEATLEY: Your Honor, contributory
20 infringement is when the infringement contributes, say, by --
21 by providing services for the goods, but does not directly
22 affix the mark to the products or ship the products to
23 consumers. Here, Sportswear is the party that actually
24 affixes the infringing marks to the products. They
25 manufacture the products. The manufacturer of infringing

1 products is always directly liable. They are also the
2 distributor. They actually ship the products to the
3 consumers, while Vintage Brand is the seller. All three of
4 those are well-recognized bases for direct liability.

5 THE COURT: All right. Good. I'll take that under
6 advisement, as well.

7 And fourth, Penn State is proposing an instruction
8 regarding licenses and licensees to which Vintage Brand
9 objects. So I assume the only licensee at issue here is CLC,
10 but perhaps I'm wrong. So is there a dispute here about
11 whether the licensor/licensee relationship has, in some way,
12 corrupted or destroyed Penn State's trademark rights here such
13 that anything beyond a basic instruction regarding
14 licensor/licensee relationship is required?

15 MR. MCKENNA: Your Honor, I think the objection is
16 essentially that the mere reference to trademark rights
17 arising out of licensing grossly understates the actual legal
18 rules about the circumstances under which licensors are able
19 to establish trademark rights. And so I think our request is
20 if there's going to be an instruction along those lines, then
21 it needs to actually track the law and it needs to actually
22 require the jury to make findings about quality control and
23 actual quality control by Penn State, and not just contractual
24 references to it.

25 MS. WHEATLEY: Your Honor, Defendants have taken

1 the position that the only trademark source of a product is
2 the manufacturer. That is one of the things they have argued
3 in the jury instructions they have proposed and to limit
4 source to that. The Lanham Act expressly recognizes
5 licensing. There is a section of the Lanham Act that goes
6 precisely to that point, that the licensor steps into the
7 shoes of the licensee, and that the licensee's use and the
8 rights therefrom inure to the benefit of the licensor.

9 In other words, Penn State steps into the shoes of
10 its manufacturers and the rights they derive from selling Penn
11 State-branded products go to Penn State. And because of their
12 argument that only the manufacturer is the source, we think it
13 is important here to have an instruction for the jury so that
14 they understand that a licensor can still own a trademark and
15 have trademark rights from that. And our instruction is
16 entirely consistent with the Lanham Act. It's a separate
17 section. And the Lanham Act does not require, you know,
18 extensive quality control. But we're going to put on evidence
19 of quality control, so I don't think that's an issue.

20 THE COURT: All right. Thank you.

21 MR. MCKENNA: Can I respond to that quickly? I
22 just want -- I think Counsel's conflating two different points
23 that I just want to make sure the Court is clear about. So
24 the argument that Vintage Brand has consistently made is that
25 with respect to understanding the use by Vintage Brand on --

1 on its clothes that Plaintiff needs to prove that that's use
2 as a trademark, that's got one definition under the Lanham
3 Act, the use and commerce requires use to identify the source
4 of a particular product. That's with respect to the proof
5 regarding the nature of the use on Vintage Brand's products.

6 This argument is about the acquisition of rights by
7 Penn State. We don't dispute that the Lanham Act says that a
8 party is entitled to claim trademark rights by virtue of the
9 rights that derive from its licensee. But it is the
10 definition of a related company under the Lanham Act that in
11 order to acquire rights in that way, you must establish
12 quality control. So our -- again, our objection is that if
13 the jury is going to be instructed about rights acquired
14 through licensing, they need the whole picture of what's
15 required in order for that to be true.

16 MS. WHEATLEY: Your Honor, to my knowledge,
17 Defendants have never challenged that there is quality control
18 here, and we are going to put on evidence of the same, and
19 they have not actually challenged Penn State's rights in that
20 respect. And most importantly, they have not alleged any sort
21 of abandonment affirmative defense, which is what they would
22 have had to do if, at this late stage, they wanted to say Penn
23 State does not control use of its marks.

24 So a jury instruction on that point would be going
25 to an issue that is not in the case. So I think it would be

1 very, very confusing to the jury.

2 THE COURT: All right. I'll take that under
3 advisement, as well. Thank you.

4 And finally, there seems to be an issue unrelated
5 to the jury instructions. So we talked about this in camera
6 earlier. Penn State, last Tuesday, filed a stipulation of
7 facts between the parties, although it appears that the
8 stipulated facts are now not entirely stipulated to, as we
9 discussed earlier off the record.

10 So specifically, as I understand it, Vintage Brand
11 complains that Penn State is improperly refusing to stipulate
12 to Vintage Brand never sold merchandise featuring certain
13 marks. Penn State, do you generally contest this fact? And
14 furthermore, I should add, Vintage Brand objects to the
15 inclusion of paragraphs 28 through 33 on relevance grounds.

16 So I'll start with you, Ms. Wheatley.

17 MS. WHEATLEY: We do contest the fact that -- that
18 we should be required to stipulate that Vintage Brand has
19 never sold goods with certain Penn State marks. There is
20 testimony, under oath, that they have designated it goes to
21 some of those marks. And we do not have a complete record of
22 their website. There is evidence in the case that the
23 memorabilia they assembled and that they applied to
24 merchandise includes memorabilia which has the marks that
25 they're saying we should stipulate they have never used. So

1 we don't feel we can do that.

2 MR. HARMS: Yes, Your Honor. The fact that Vintage
3 Brand never made available the Lion head or chipmunk, as it's
4 occasionally called, and the paw print design on its website
5 is completely uncontested in this case. Penn State is not
6 going to put on any contrary evidence, and under the local
7 rules, they are required to stipulate to that fact. The only
8 party that's offering evidence contrary to that fact is
9 Vintage Brand itself. And Vintage Brand is offering that
10 evidence, the testimony of Ms. Maffey, to prove that it's
11 wrong, not to prove that the fact that those logos actually
12 appear on the website.

13 So Penn State is not offering contrary evidence.
14 The fact that it's not contested otherwise, they should be
15 required to stipulate to it.

16 THE COURT: How soon do you need a ruling on that
17 stipulation? Is it going to affect these openings?

18 MR. FINKELSON: I don't think the stipulation
19 affects the opening. But it was our intent, Your Honor, to
20 read and put in to evidence the stipulation before our first
21 witness today, following openings. And this is a little bit
22 of a different kind of factual stipulation because it's got
23 visuals, and I know it's typically just read into the record.
24 But it is our intent to present those stipulations to the jury
25 at the start of the presentation of our case following opening

1 statements.

2 THE COURT: All right. Well then I'll have a
3 ruling for you -- I can make a ruling on that issue over the
4 lunch hour. I'll give you that ruling before you begin your
5 opening statements in an hour or so. All right.

6 I think that covers it, at least based on what I
7 can see from your papers over the course of the weekend.

8 All right. Well, let's say -- you'll need about an
9 hour or so for lunch. I think, realistically, we are probably
10 -- and I need to research this one issue to my satisfaction.
11 So we'll stand in recess, and we'll assume we'll be back on
12 the record at about 1:30.

13 Mr. Finkelson, you're going to open, I think, for
14 Penn State?

15 MR. FINKELSON: I am, Your Honor.

16 THE COURT: And, Mr. Fetters, you're going to open
17 for Vintage Brand. You anticipate these openings, somewhere
18 around half an hour each, I think?

19 MR. FETTERS: Yes.

20 THE COURT: And then we'll deal with -- I assume
21 you have at least some witnesses lined up. Do you have a
22 sense of -- is it a number of witnesses, Ms. Wheatley,
23 Mr. Finkelson, this afternoon? Is it one or two? I mean --
24 by the time we -- I'm just sort of plotting out where we will
25 be. We will probably be -- we will probably be done with

1 opening statements somewhere in the 2:30 lineup. You might
2 want to decide at this point whether we should take a short
3 recess at that point or not. We can. I typically try to go
4 an hour-and-a-half to an hour and 45 minutes, you know, before
5 there's a recess. And Mrs. Rhinehart instructs the jurors,
6 you know, use the restroom. This is the time to do it, on the
7 recess. It's not to be -- I don't want to interrupt you in
8 the trial. That apparently happens -- it happened downstairs
9 last week in another trial. Unbelievable. Somebody had to go
10 to the bathroom, you know, in between the recesses, in my
11 mind. But it happened. So they get pretty clear instructions
12 here on what they do and what they shouldn't do.

13 So, just, you might want to chart that out in your
14 mind in terms of, you know, who you're going to call, the
15 amount of time it will take for direct and cross examination.
16 And again, I would like to get as much done today, the first
17 day, disrupted, obviously -- necessarily disrupted by the voir
18 dire process, which was nevertheless conducted fairly
19 expeditiously. So sort of think about that in terms of your
20 lineup of people.

21 But I think you'll be under way in the trial
22 probably in the 2:30 to 2:45 time frame. And then we will
23 press on accordingly.

24 Is there anything else I need to know before I go
25 to lunch?

1 MR. FETTERS: No, Your Honor.

2 THE COURT: All right.

3 MR. FINKELSON: No, Your Honor.

4 THE COURT: All right. You'll have a ruling on the
5 one issue before the jury is reassembled so you can prepare
6 accordingly with regard to the stipulations. All right. Very
7 good.

8 Court will rise, then, until about 1:30 p.m. Court
9 will rise.

10 (At 12:37 p.m., a lunch recess was held.)

11 (1:44 p.m.)

12 THE COURT: All right. We're back on the record
13 after our luncheon recess. The jury remains in the jury room.
14 Before we bring the jury in, I will briefly rule on some of
15 the outstanding issues that will impact our trial.

16 First, given the parties' statements and Vintage
17 Brand's statement that it will not pursue an anti-trust
18 defense, I find that evidence related to anti-trust concerns
19 is no longer relevant, and such evidence has little, if any
20 relevance to an aesthetic functionality defense, and any
21 possible relevance is substantially outweighed by the
22 possibility of unfair prejudice confusing the issues and
23 wasting time. Evidence related to anti-trust concerns will
24 therefore be excluded from the trial.

25 Second, as to the issues regarding the proposed

1 stipulations, frankly, it doesn't seem to the Court to be of
2 any great reason why the parties cannot stipulate to the
3 contested fact, for whatever reason, the stipulation cannot be
4 reached. So I'm not going to put my thumb on the scale,
5 so-to-speak, and force any stipulations to which the parties
6 do not agree. And therefore, the parties should leave out
7 Vintage Brand's proposed stipulation and also strike
8 paragraphs 28 through 33 from the stipulations. The parties
9 may present whatever evidence they believe is necessary to
10 prove these facts, subject, of course, to the Federal Rules of
11 Evidence.

12 So I think I've addressed the immediate issues we
13 have to be concerned with. Mrs. Rhinehart, if you want to
14 escort the jury in, please.

15 MR. MCKENNA: Your Honor, before we bring the jury
16 in, can I just have one minute. I just --

17 THE COURT: Slow down a little bit. You're
18 excited, but the court reporter is not so much.

19 MR. MCKENNA: I'll start over. I just wanted to
20 add one thing on the nominative fair use, which I understand
21 you've still taken under advisement and not ruled on. Counsel
22 referred to the Complaint. During the break, we had a chance,
23 actually, to look at the Complaint again, and I recommend it
24 to the Court. In the Complaint, the Complaint -- all of the
25 allegations of infringement are by references to what are

1 called the infringing marks. The infringing remarks is a
2 defined term, and in the Complaint, the definition of
3 infringing marks is done entirely by references to images on
4 the shirt. There's no separate allegations regarding
5 infringement in any other way. There are allegations that the
6 shirts are sold on the website. But there are no additional
7 allegations that are specifically addressing infringement in
8 any way, other than on the shirts.

9 Obviously, Vintage Brand can't have waived an
10 affirmative defense to conduct that was not clearly
11 articulated as infringing, which is what our nominative fair
12 use has always been focused on, which is not the shirts, but
13 the image -- the website references and all of the other
14 things. So I think -- I just wanted to draw the Court's
15 attention to that.

16 I also draw the Court's attention to a
17 recently-decided Third Circuit decision, Artoss, Inc., It's
18 A-r-t-o-s-s, Inc., versus Artoss GMBH. There's not a federal
19 reporter citation, but it's a 2024 West Law, 282, 7927.
20 Holding that the trial court didn't err when instructing the
21 jury on nominative fair use, even though it mentioned until
22 the eve of trial. Obviously this is not a circumstance where
23 it was only mentioned on the eve of trial. This came to the
24 Court's attention and to Counsel's attention in the Daubert
25 Hearings in May of 2023.

1 MS. WHEATLEY: Your Honor --

2 THE COURT: Well, do you have a microphone? All
3 right. Use Mr. Finkelson's.

4 MS. WHEATLEY: I'll read from the Plaintiff's
5 Complaint. Additionally -- this is paragraph 91.
6 Additionally, Defendants' web page for Penn State is titled
7 quote, Penn State Nittany Lion's Vintage Designs for apparel
8 gear in a clear attempt to associate Defendants' goods with
9 Penn State and the goodwill Penn State has built over decades
10 as embodied in the University marks.

11 I believe we very clearly stated that the text on
12 the website was part of our infringement claim, and we also in
13 our count for federal trademark infringement, referenced the
14 advertising of the goods.

15 So we would contend that the Defendants were very
16 much on notice that we alleged the website. This is in
17 addition to repeated pictures of the full website and the body
18 of the Complaint.

19 THE COURT: Thank you. All right. The Court will
20 take that under advisement. Anything else?

21 MR. MCKENNA: No, Your Honor.

22 THE COURT: Let's get under way. Mrs. Rhinehart,
23 escort the jury in.

24 (At 1:47 p.m., the jury entered the courtroom.)

25 THE COURT: You may be seated.

1 All right. We're ready to hear opening statements,
2 I believe. Mr. Finkelson, you're opening for Penn State, I
3 believe?

4 MR. FINKELSON: I am, Your Honor.

5 THE COURT: Go right ahead, sir.

6 MR. FINKELSON: Thank you. You can't take what
7 doesn't belong to you. Someone else's home, their car,
8 groceries you haven't paid for, and most importantly, for
9 purposes of this case, you can't take somebody else's good
10 name. Their identity. For my client, that good name, that
11 identity is the Pennsylvania State University. Penn State and
12 the symbols that the University owns and uses to communicate
13 to the public who the University is and what it stands for.

14 Walk onto any one of the more than 20 Penn State
15 campuses across the Commonwealth, visit any of the businesses,
16 many of them family-owned, who make a living selling authentic
17 Penn State merchandise with our permission, and Penn State's
18 identity is impossible to miss. The school traces its roots
19 back to the 1800s. And the evidence in this case will show
20 that for decades and decades, Penn State has protected its
21 identity with trademarks. Words and logos that are registered
22 with the United States Patent and Trademark Office that the
23 University owns and that the University uses to tell the world
24 we are Penn State. We stand for education, for research, for
25 community, for quality, and for excellence.

1 For Penn State, those words and symbols, its
2 trademarks, which I think you can now see up on your screens,
3 are symbols of the University's reputation. And for the
4 businesses, many in Pennsylvania who play fair and by the
5 rules, who seek and get permission to use Penn State's
6 trademarks on merchandise and give some of the proceeds of
7 those merchandise sales back to the University, Penn State's
8 trademarks mean a livelihood.

9 But the evidence in this case will show that for
10 these Defendants from Seattle, Washington, Penn State's
11 trademarks are just a way to make a quick buck. By breaking
12 the rules that everybody else plays by, by just taking and
13 copying the trademarks that belong to Penn State and putting
14 them on t-shirts -- you can see them up on your screen and
15 you'll hear about this during the trial -- putting Penn
16 State's trademarks on t-shirts and other merchandise that the
17 Defendants sell on their own website without any permission
18 from Penn State at all, profiting unfairly and unlawfully from
19 the reputation that Penn State and so many others have spent
20 so much time, effort, and money building, the millions of
21 students, parents, faculty, alumni and Pennsylvania merchants
22 who support the University. And we're here, ladies and
23 gentlemen, to ask you please make the Defendants stop once and
24 for all. Give us back our name.

25 I'm Dave Finkelson, and together with my law

1 partner, Lucy Wheatley, and our team, we have the honor and
2 the privilege of representing Penn State in this case, and I
3 want to start on behalf of us, but most importantly on behalf
4 of our client, Penn State, by saying thank you. Thank you for
5 serving on this jury. We know what a sacrifice this is. It
6 is taking you away from our families and your daily lives.
7 And we're going to do our best in this trial to present the
8 evidence to you as efficiently and as clearly as we know how.

9 So this is a case about trademarks. So first and
10 foremost, what is a trademark. Well you already know more
11 than you may think. Slide four, please, Mr. Burkhart. A
12 trademark can be a name, a logo, or a design. It's often
13 referred to as a brand. And here's the thing. Anyone can own
14 a trademark. Me, you, a mom and pop business, a community
15 organization, Penn State. There are some examples of
16 trademarks for apparel up on your screen. The United States
17 Marine Corps, the band, The Rolling Stones, the Olympics, the
18 Pittsburgh Steelers, the Red Cross. But trademark symbolizes
19 its owners' reputation. And it tells you, as a consumer, who
20 stands behind the product.

21 You're going to learn in this case that trademarks
22 are a type of property. And in many respects, owning a
23 trademark is a lot like owning other types of product. Think
24 of a car or your home. And just like a homeowner has every
25 right to keep trespassers off of their land, a trademark

1 owner, like Penn State, has the right to the exclusive use of
2 its trademark property and the right to decide who else can
3 use it. And when someone, here, the Defendants, takes a name
4 or logo that belongs to someone else, Penn State, without
5 permission and in a way that is likely to confuse the public,
6 that's known as trademark infringement. It's also called
7 unfair competition, which makes sense, right, because it's not
8 fair to do that. It's not fair to Penn State. It's not fair
9 to the small businesses who are playing by the rules. And
10 it's not fair to consumers who may be confused in to thinking
11 that Penn State stands behind these Defendants' merchandise,
12 when that's not the case at all.

13 Which brings me to three things that I want to
14 preview for you in our short time together this afternoon, and
15 that the evidence in this case will show.

16 First, Penn State owns its name and logos as
17 trademarks. In fact, as you'll hear, many of those trademarks
18 have been registered with the United States Patent and
19 Trademark Office for so long that they're known as
20 incontestable. Nobody can say that Penn State doesn't own
21 them; nobody can say that they're not valid trademarks.

22 Second, the Defendants, Chad Hartvigson and two of
23 his companies, Vintage Brand and Prep Sportswear have sold
24 Penn State-branded apparel and merchandise on their Vintage
25 Brand website without Penn State's permission. The evidence

1 will show that the Defendants have infringed Penn State's
2 trademarks. They have competed unfairly.

3 Third, the Defendants have done it on purpose and
4 they will do it again in a heartbeat if you let them. And
5 that's where Penn State needs your help.

6 Many cases that end up in front of a jury like you
7 are about lots of money. I'm going to tell you from day one,
8 this isn't one of those cases. Yes, the Defendants have
9 already profited wrongly from Penn State's trademarks, and
10 they should pay a price for that. But the amount of money
11 that Defendants have already made isn't why we're here today.
12 We're here because Penn State, like any other university or
13 organization or business who owns trademarks has an obligation
14 to protect those valuable trademarks and because we can't stop
15 Mr. Hartvigson and his companies by ourselves.

16 As you'll hear, we tried, because when all this
17 started, that's exactly what Penn State asked Mr. Hartvigson
18 to do. Just stop. But Mr. Hartvigson and his companies
19 wouldn't stop. Penn State didn't want to file this lawsuit.
20 Penn State had to file this lawsuit to protect its trademark
21 property, to protect its reputation, and to protect all those
22 people out there who do respect Penn State's trademarks and
23 who benefit from using those trademarks lawful.

24 But bringing this lawsuit, as you'll learn, only
25 did the job part way.

1 As you'll hear, it led Mr. Hartvigson to put a
2 temporary pause on selling Penn State merchandise until this
3 lawsuit is over. The key word there is temporary. Because
4 Mr. Hartvigson makes no bones about it, he and his company
5 will start selling Penn State trademark merchandise again
6 tomorrow, at the click of a button, unless you tell him it's
7 not okay.

8 This trial is Penn State's only way to put a stop
9 to Defendants' unlawful use of our trademarks for good.

10 So let's talk about those Penn State trademarks
11 that are so important in this case. They're on the board that
12 is up in front of you. Penn State owns other trademarks as
13 well. But the ones that you see on the board are the ones
14 that we'll all be focused on in this trial. The evidence will
15 show that every one of these trademarks is meaningful and
16 valuable, not because they're especially pretty, not because
17 Penn State is the only thing that you can call a university or
18 the Nittany Lion is the only mascot that you can pick for a
19 University. They're meaningful and valuable because of the
20 reputation that Penn State and so many others in its community
21 have built in these names and logos. They're meaningful and
22 valuable because these trademarks have come to represent Penn
23 State and its reputation and nothing else.

24 As you'll learn, each of these trademarks also has
25 a story. You'll hear that from Jackie Esposito. Ms. Esposito

1 is the retired librarian of the University. She worked at
2 Penn State for 35 years, and she literally wrote the book on
3 Penn State's symbols and their historical significance. She's
4 going to be the very first witness we put on the witness stand
5 this afternoon.

6 Ms. Esposito, can you please stand so the jury can
7 see you? Thank you.

8 Let's start with the Penn State trademark. It's
9 the one at the top of the board, and everyone in this room has
10 heard of this one. The earliest reference we could find was
11 in a yearbook from 1890. And in the early 1980s, after many
12 years of using the name Penn State, Penn State applied for and
13 received from the United States Patent and Trademark Office
14 the first of many trademark registrations that it's received
15 for the words Penn State in any font or style.

16 As you already know, trademarks are property. And
17 just like your house or land comes with a deed or your car
18 comes with a title that tells the world you own it. So, too,
19 in trademarks.

20 This is the official trademark registration for the
21 trademark Penn State. You can tell by the gold seal that's on
22 the very first page. It tells Penn State, it tells the world,
23 it tells you that Penn State owns it and has the exclusive
24 right to use it on merchandise.

25 The Pennsylvania State University trademark, the

1 second one on the board, the University's official name. It
2 got that name in 1953, and it's used it ever since. If you've
3 ever been to a Penn State football game, the Pennsylvania
4 State University is etched in stone right next to Beaver
5 Stadium.

6 The University seal trademark. It's the third one
7 down from the top. That, too, was created in 1953 when the
8 University adopted the Pennsylvania State University as its
9 formal name. It appears on a ton of authentic Penn State
10 merchandise. But more importantly, it appears on every Penn
11 State diploma. If you're a graduate of a college or a I offer
12 the or a high school, a diploma symbolizes all the hard work
13 you put in and that you made it. And for graduates of any of
14 Penn State's campuses across Pennsylvania and for their
15 families who helped them get over the line, the University
16 seal symbolizes that accomplishment.

17 But you'll learn in this case that not only are the
18 Defendants trying to get away with using the University seal
19 on the merchandise that they sell, they're actually trying to
20 take the University seal away from Penn State. Believe it or
21 not, they are going to ask you in this trial to cancel the
22 seal trademark so that Penn State would not own its own seal
23 any more.

24 They're claim is that the University seal, which
25 truthfully reflects that Penn State is a public university,

1 and it says the Penn State University right on it, looks too
2 much like an insignificant any I can't of the Commonwealth of
3 Pennsylvania to be a trademark in its own right.

4 Well, the Patent and Trademark Office didn't think
5 so. It granted Penn State a trademark registration for the
6 University seal way back in 1984, and it's renewed it ever
7 since. And the Defendants haven't located a single person who
8 second guesses that.

9 The Nittany Lion shrine trademark, the next one
10 down on the board. It's a logo version of a sculpture, a
11 Nittany lion shrine. You probably don't know this, but
12 there's a Nittany Lion shrine sculpture on virtually every
13 Penn State campus. It's a place to go, the place to
14 celebrate. The first one was actually a gift from the class
15 of 1940. Four members of that class went off to fight for our
16 country in World War II.

17 The Pozniak lion trademark, the next to the last
18 one on the board in front you. This one was defined by the
19 artist, Ray Pozniak, in the late 1970s. Throughout the 1980s,
20 it was actually a primary symbol of the university's athletic
21 programs, and when Mr. Pozniak passed away, his family granted
22 the rights to the Pozniak lion trademark to Penn State, which
23 has continued to honor the family's wishes by allowing a few
24 groups to use the trademark going forward, the Nittany Lion's
25 Wrestling Club, and a group called the Lion Ambassadors, which

1 is run by Penn State Alumni, and as the name suggests, are
2 ambassadors for the University for its legacy and for its
3 reputation.

4 Every one of the trademarks that I've talked about
5 so far has a registration with one of these gold seals on it.
6 Issued by the Government that says it belongs to Penn State,
7 not to the Defendants. So when you see authentic merchandise
8 out in the marketplace with these registered trademarks,
9 you'll often notice it because they have a symbol. It's a
10 cricle with an R inside of it, and you can see it on those
11 trademarks are. That's R or registered trademark.

12 What you'll also learn in this case is there's a
13 second way in this country to own a trademark and have all the
14 rights that come with owning it. If you use it first and then
15 you use it continuously on products, it's yours, even if you
16 don't register it. And no one else is allowed to use that
17 trademark in a way that confuses the public.

18 That's the case with the last trademark on the
19 board, the S lion. And you can tell it's one of those
20 trademarks because it has the letters TM next to it at the
21 bottom. That's TM for trademark. The S lion symbol has a
22 long history, dating back to when the Nittany Lion was
23 pictured as having a mane. Bringing that history to life,
24 Penn State has been branding apparel and merchandise with the
25 S Lion for years, long before the Defendants ever launched

1 their Vintage Brand website.

2 Now, Penn State authorizes hundreds of companies,
3 large and small, to put Penn State's trademarks on apparel and
4 merchandise sold to the public online and in stores. That
5 authorization is known as a license. Think permission. It's
6 a mutual agreement between Penn State and its licensees and
7 its mutually beneficial. Penn State grants those licenses
8 with the help of a company called Collegiate Licensing
9 Company, which is one of several entities out there that help
10 universities like Penn State connect with manufacturing and
11 retail partners so that retailers can sell authentic Penn
12 State merchandise at all price points, low, medium, and
13 higher, to meet customers' needs.

14 And they sell that authentic merchandise and make
15 it available to customers pretty much everywhere, whether
16 that's at the Kohl's that's across the street from the
17 courthouse here at the Walmart that's in or near the town
18 where you live or online at Dick's Sporting Goods dot com or
19 at any other legitimate legitimate websites.

20 But you're here in this trial, what really sets
21 Penn State apart from most other colleges and universities is
22 that so many of those legitimate authentic merchandise sales
23 are made by businesses right here in Pennsylvania. Those
24 Pennsylvania businesses and their employees depend on the sale
25 of Penn State-branded goods for their livelihood.

1 In fact, the highest seller anywhere of authentic
2 Penn State-branded merchandise, number one, is a store called
3 The Family Clothesline, a family business in State College.
4 You can see a picture of the storefront for The Family
5 Clothesline up on your screen. You can also see the Lions
6 Pride, which is on the same street in State College, and is
7 also among the top sellers.

8 Back in the gallery today, I saw Caroline Gummo, a
9 Penn State alum, who runs the Family Clothesline, along with
10 her husband. Ms. Gummo took time out of her day to drive here
11 today because this case is important to her, to her family,
12 and to her employees also. Ms. Gummo, can you please stand so
13 that the jury can see you? Thank you.

14 I'd also like to ask Stephanie Petulla to stand.
15 Ms. Petulla, also a local Penn State alum, is Penn State's
16 director of licensing and visual identity. She's at the table
17 with us today. She's going to be here right next to you for
18 the whole trial at our table on behalf of Penn State. Thank
19 you, Ms. Petulla.

20 Ms. Petulla will testify to you about the Penn
21 State brand that she helped build with these local businesses
22 and others to ensure that Penn State's trademarks are used in
23 a way that helps the University and that protects its
24 reputation, and about how the people who make and sell genuine
25 Penn State merchandise adhere to Penn State's standards for

1 quality, Penn State's standards for safe working conditions
2 and for paid labor. All of that is part of Penn State making
3 sure that customers know that the University stands behind its
4 merchandise, that customers can trust in it, so that when it
5 arrives in the mail to you or to the person you gave it to as
6 a gift, you get what you paid for, the real deal.

7 But when these Defendants sell what they sell,
8 using Penn State's trademarks, they don't have permission;
9 they don't have a license. None of what they sell is subject
10 to Penn State's quality standards, and not a cent of the money
11 made from those sales goes back to benefit the University or
12 the community. It just goes straight into the Defendants'
13 pockets.

14 So I've talked about the long history of Penn
15 State, the long history of Penn State's trademarks.
16 Defendant, Vintage Brand's history is a lot shorter.

17 You'll learn that out in Seattle, Mr. Hartvigson
18 started selling Penn State-branded goods on his website in
19 2018. Those goods are printed and distributed by another
20 Defendant in this case, Prep Sportswear, which is another
21 company for which Mr. Hartvigson is the CEO and a large
22 shareholder. Vintage Brand, just like the company's name
23 suggests, sells so-called vintage versions of other peoples'
24 brands. No one is off limits. Small colleges, big
25 universities, professional sports teams. You name it; Vintage

1 Brand sells it; Prep Sportswear prints and ships it.

2 So you can see, this case is about a lot more than
3 just Penn State.

4 So how do the Defendants pull it off? What you'll
5 learn in this case is that Defendants start by acquiring
6 pieces of memorabilia of Penn State and others. Think about a
7 ticket stub or a button or a pennant. But the Defendants
8 don't resell that memorabilia. This is not a case about
9 reselling on eBay or reselling at a secondhand store.
10 Instead, the Defendants take that memorabilia and they run it
11 through a scanner, a scanner, just like you may have seen at
12 your office or at the local copy store. They create a digital
13 image of Penn State's trademarks, and they transfer those
14 trademarks onto a t-shirt or a sweatshirt or a hat, a mug, a
15 pennant, and they slap a Vintage Brand label on it. They
16 literally copy the trademarks that Penn State and so many in
17 its community have worked to build. And they put those
18 trademarks on merchandise that Vintage Brand sells itself
19 online.

20 Can I have slide six, please, Mr. Burkhardt? You're
21 now looking at a page straight from the website that Vintage
22 Brand uses to pull off those sales. You'll learn in this case
23 that the Vintage Brand website looks very much like other
24 websites out there selling authentic Penn State merchandise,
25 and that's no accident.

1 You'll actually hear by video the testimony under
2 oath of a consumer and Penn State alum, Meghan Maffey, who
3 went to the Vintage Brand website and thought that it was
4 authorized by Penn State. It's not. But you can see on the
5 screen in front of you why she thought it was. It's titled
6 Penn State Nittany Lion's Vintage Designs. We put a red box
7 around it for you. And as you can see, the few examples I
8 showed you when I first started talking today, are just the
9 tip of the iceberg. The Vintage Brand website offers for sale
10 one item after another, bearing the Penn State brand, the
11 trademarks that belong to Penn State.

12 What false impression about a connection to Penn
13 State does that give to consumers who visit the Vintage Brand
14 website? That's a question about confusion, which is one of
15 the things that you're going to be asked to consider in this
16 case, whether any consumers are likely to be confused in to
17 thinking that Defendants' merchandise is put out by or
18 sponsored by, approved by, or affiliated with Penn State when,
19 in fact, it isn't.

20 As you'll hear, and it makes sense, Defendants'
21 merchandise doesn't have to be identical to the real thing for
22 there to be confusion. The question is whether it is similar
23 enough to the real thing that when consumers see it, they
24 think, mistakenly and incorrectly, that it has Penn State's
25 permission.

1 Now, as with everything else in this case, you can
2 and should use your common sense to answer that question. But
3 we tested it for you, too. You're going to hear in this trial
4 from David Franklyn, a trademark law professor at the Arizona
5 State School of Law, who specializes in conducting what are
6 known as trademark confusion studies. Professor Franklyn
7 performed one of those studies in this case, and as he'll walk
8 through with you, it confirmed what your intuition may already
9 be telling you. Mr. Hartvigston and his companies are causing
10 substantial confusion.

11 About one out of every three people Professor
12 Franklyn tested, believed that Vintage Brand's merchandise had
13 Penn State's blessing, which it doesn't. As you'll learn,
14 that's more than twice, more than twice the amount of
15 confusion that all the experts in this field agree is too
16 much.

17 One more word on confusion. Having listened to me
18 this afternoon, you already know a heck of a lot more than the
19 average consumer about genuine Penn State merchandise on the
20 one hand and Defendants' merchandise, that the evidence will
21 show, is infringing. Take a look, please, at the merchandise
22 that's been up on this display the whole time I have been
23 talking. Ask yourselves, is all of this merchandise the real
24 deal? Or is it all of it fake? Or is some the real deal and
25 some the fakes? And if it's a mix of both, which is which?

1 If you can't tell for sure today, just imagine what you would
2 have felt coming across these products yesterday while
3 shopping online or seeing someone wear them down the street.

4 So in the face of all of this evidence, is there
5 any reason why Penn State should be treated differently than
6 every other owner of trademark property. Is there any reason
7 why the rules that apply to everyone else don't apply to
8 Mr. Hartvigson and his companies? Listen to the evidence.
9 Use your common sense. And the only answer to that question
10 is no.

11 Mr. Burkhardt, can I have slide seven, please?
12 The Defendants will tell you that what they do is okay, as
13 long as you just read the fine print. If you squint at the
14 screens in front of you, you may be able to see an example of
15 the fine print that the Defendants like to talk about at the
16 top where Vintage Brand says on its website it is not
17 affiliated with the Penn State Nittany Lions or the University
18 book store or any college. These so-called disclaimers, the
19 evidence will show, they don't make any difference. The fine
20 print doesn't prevent confusion; that's common sense; and the
21 scientific studies that you'll hear about in this case confirm
22 it.

23 Defendants may also try to tell you that what they
24 do is okay because they sell to fans. But the evidence will
25 show that selling to fans is no defense for the Defendants'

1 trademark infringement, and it's no excuse for that trademark
2 infringement either.

3 Universities, as you already know, who have fans
4 and supporters have trademark rights, too, just like
5 individuals and small businesses and professional sports teams
6 and everyone else who owns and protects its reputation with a
7 name or a logo.

8 I showed you earlier today the Steelers and Rolling
9 Stones trademarks. When you buy a Steelers shirt at a game or
10 a Rolling Stones shirt at the concert merchant, are you a fan?
11 Yes. Would you also think that the Steelers or the Rolling
12 Stones must have given permission for their names and logos to
13 be used on that t-shirt, that they're getting a share of the
14 proceeds? Of course. Can you, as a fan, run home, snap a
15 digital picture of the names and logos on that t-shirt and
16 start selling t-shirts yourself featuring The Rolling Stones
17 and the Steelers? Of course not. And the Defendants can't do
18 that to Penn State either.

19 And that brings me to my final point, and one that
20 I would ask you to be on the look out for when you hear those
21 and other excuses from the Defendants during the course of
22 this trial. What will the evidence show is the Defendants'
23 real intent in this case.

24 Can I have slide eight, please, Mr. Burkhardt.
25 First, it will show that Defendants know exactly what

1 trademarks are and how important they are. Both Vintage Brand
2 and Prep Sportswear have trademarks in their own names or
3 logos. You see on your screens Vintage Brand's trademark on
4 merchandise, the hat, in the top corner. Why? Because
5 trademarks mean something. They have value. And the
6 Defendants know it. Vintage Brand even licenses its own
7 trademark to Prep Sportswear. So they also both know what a
8 license is and that you need to have one.

9 Second, the evidence will show that the Defendants
10 knew full well that Penn State's names and logos are
11 trademarks. When a trademark is registered in the United
12 States, anyone can find out that it exists by searching a
13 publicly-available website that the US Government makes
14 available for anyone to search. Before -- before he started
15 selling Penn State-branded goods, Mr. Hartvigson went to that
16 website. He searched for and he found the trademark
17 registration for Penn State. He knew it existed. But he went
18 full steam ahead.

19 The Defendants know how to do this the right way.
20 But when it came to Penn State, they chose, instead, to ignore
21 the rules that all other businesses fairly play by. They
22 chose, instead, to take and profit from Penn State's
23 trademarks without our permission, and they'll do it again
24 unless you stop them.

25 So let me end right where I started, because we

1 think this case really is as simple as it may already seem to
2 you. The Defendants took what doesn't belong to them. They
3 took and trespassed on Penn State's identity without
4 permission in a way that is likely to confuse consumers into
5 to thinking that Defendants have a relationship with Penn
6 State. They don't. The Defendants are supporting and are
7 supported by Penn State. They aren't. That's called
8 trademark infringement. That's called unfair competition.
9 And that's what we will prove to you over the course of this
10 trial. Thank you.

11 THE COURT: All right. Thank you, Mr. Finkelson.

12 MR. FINKELSON: Thank you, Your Honor.

13 Mr. Fetters, opening?

14 MR. FINKELSON: I'm going to have my colleagues get
15 this out of Mr. Fetter's way.

16 THE COURT: Oh. Thank you. Let's pause. All
17 right. Mr. Fetters, opening?

18 MR. FETTERS: Thank you, Your Honor.

19 THE COURT: Go right ahead, sir.

20 MR. FETTERS: Well, folks, by now you've figured
21 out that this is a trademark case, and I'm guessing that when
22 you received your jury summons, maybe some of you were hoping
23 for a really interesting case, maybe a criminal case with
24 facts similar to the things you see on shows like Date Line.
25 Well, sorry to disappoint. This is a trademark case. But

1 we'll try to make it as informative and useful for you as
2 possible.

3 But you're about to get a crash course, really, in
4 trademark law. And I'm guessing that for most of you, you
5 probably haven't spent all that much time really thinking
6 about trademarks or trademark law. And you might be wondering
7 to yourself, what is this case really going to be about at its
8 essence. Well, it's about consumers, folks just like you.
9 You see trademark law is designed to protect consumers from
10 being misled as to who is responsible for the quality of a
11 producer's products.

12 So when you hear the attorneys and the witnesses
13 talk about consumer confusion, confusion as to source, that's
14 what we're talking about. Are consumers being misled in to
15 thinking that Penn State is responsible for the quality of
16 Vintage Brand's products.

17 Let me put that slightly differently. Do consumers
18 intend to purchase products put out by Penn State but they're
19 being misled in to purchasing products from Vintage Brand
20 instead. That's what Penn State is here trying to prove. We
21 see -- we say that consumers are not confused as to who is
22 responsible for the quality of Vintage Brand's products. And
23 we think that at the conclusion of the evidence, you'll find
24 also that the answer is consumers are not being misled as to
25 who is responsible for the quality of Vintage Brand's

1 products.

2 And I think that there are really two primary
3 reasons why the evidence will support you in reaching this
4 very same conclusion.

5 The first relates to the buying experience when
6 consumers do purchase Vintage Brand's products. Consider
7 this. There is only a single place to purchase Vintage
8 Brand's products. It's at Vintage Brand's websites, www dot
9 Vintage Brand dot com. You can't get Vintage Brand's products
10 at Macey's; you can't get them at Wegman's; you can't get them
11 at The Family Clothesline. Only at Vintage Brand's website,
12 Vintage Brand dot com.

13 And on that website, you'll see that Vintage Brand
14 sells new merchandise, things like t-shirts, sweatshirts,
15 socks, hats, glassware, wall art, posters, puzzles featuring
16 designs, like this, (indicating) derived originally from
17 historic sports memorabilia, and that Vintage Brand offers
18 products like these relating to hundreds of different
19 universities and pro teams.

20 Now on this website, again, talking about the
21 consumer experience of buying Vintage Brand's products,
22 consumers see that Vintage Brand places prominent disclaimers
23 throughout its website in different formats so that folks know
24 for sure that Vintage Brand's products are not sponsored,
25 licensed, or endorsed by any university or team.

1 But consider this. It's not just the fact that
2 Vintage Brand places those disclaimers on its website. It's
3 the fact that Penn State's licensees do something completely
4 opposite of that. They pronounce to the world that their
5 products are officially licensed Penn State products. And why
6 do they do that? Well you'll hear from the evidence, there's
7 two reasons: One, they're contractually required to do that,
8 to affix officially licensed statements to their store fronts,
9 to their websites, in their advertising, and on the products
10 themselves. They affix officially-licensed labels and
11 stickers that are so tightly controlled, that those
12 officially-licensed stickers contain unique serial numbers
13 and holograms where consumers can actually look up, by typing
14 in that serial number on the website to confirm that those
15 products are officially licensed.

16 And what does that mean? Well, it means that
17 consumers don't have to guess. If a consumer is genuinely
18 interested in only acquiring officially-licensed Penn State
19 merchandise, that consumer can do that, because Penn State's
20 licensees make sure that consumers know that. You'll hear
21 that this is a valuable marketing advantage to be able to
22 promote your products as officially licensed Penn State
23 products. And that's what those licensees get in exchange for
24 working with Penn State and all of the controls that come with
25 that.

1 And so again, what is Vintage Brand doing? They're
2 doing the complete opposite. They're not saying on their
3 website that they're offering officially licensed products.
4 They're not say -- staying silent on the topic. They're going
5 so far as to affirmatively tell consumers, in multiple
6 formats, throughout the entirety of the website that their
7 products are their own, that they are not sponsored, they are
8 not licensed by any team or university or pro team.

9 Now, there's a second reason why the evidence will
10 show that consumers are not being mislead as to whether Penn
11 State is responsible for Vintage Brand's products. And that
12 second reason is really more fundamental. And it's about the
13 role of the historic memorabilia designs that Vintage Brand
14 prints on its shirts.

15 I said before that trademarks exist so that
16 consumers know who is responsible for the quality of the
17 product. And why is that so? Because we have a system where
18 we want to ensure that consumers have an efficient way to go
19 shopping, to make their buying decisions. And let me give an
20 example of that.

21 I think maybe the most well-known trademark that
22 folks might think of is the Nike swoosh. When you see that
23 Nike swoosh on the side of a shoe, you know immediately who is
24 responsible for the quality of that shoe. That's because that
25 Nike swoosh is a trademark, and that Nike swoosh is doing

1 trademark work. That's an important concept throughout this
2 entire trial. Trademark work. Communicating to consumers
3 efficiently and effectively who is responsible for the quality
4 of the shoe. It's not just the reputation of the trademark
5 holder generally. That's a key distinction. The reputation
6 of the trademark holder for producing the shoe. That's
7 trademark work.

8 When Vintage Brand wants consumers to know who is
9 responsible for the quality of Vintage Brand's products, you
10 look to the label where it says Vintage Brand. You look to
11 the sticker on Vintage Brand's hats, which says Vintage Brand.
12 You look to the packaging that the products come in, which
13 says Vintage Brand. That's all doing trademark work. It's
14 acting like the Nike swoosh.

15 This -- this historical memorabilia artwork that
16 Vintage Brand prints on its shirts, it's not doing trademark
17 work. You'll hear from Chad Hartvigson, who will testify that
18 the reason that Vintage Brand prints historic memorabilia
19 artwork on its products is because he hopes that consumers
20 will find the artwork attractive. He hopes that consumers
21 will have a sense of nostalgia, having looked at the artwork.
22 And perhaps most fundamentally, he hopes that by wearing these
23 products, consumers can express their affinity, their
24 affection, their school spirit, their fandom for their
25 favorite schools and teams. So that when folks wear these

1 products to the games, they can show that they're part of the
2 team. That's what this artwork does. It's not doing
3 trademark work.

4 And what Penn State will say, is well, our
5 trademark -- we have a trademark in our name, and that appears
6 in this artwork. But this is not a copyright case. This is a
7 trademark case. And what do trademarks do? They communicate
8 to consumers who is responsible for the quality of the shirt.
9 And so just because Penn State's name appears within the
10 composition of historic memorabilia artwork and just because
11 consumers think of the university in a general sense, that
12 does not mean that consumers are being misled in to believing
13 that Penn State is responsible for the quality of this shirt.

14 Now, I mentioned at the outset that this case is
15 about consumers and that's true. But this case is also about
16 another thing. It's about over reach, over reach by the
17 University. The University brought this lawsuit because it
18 thinks that it has trademark rights over any image that simply
19 causes consumers to think of the University and to think of
20 the University's reputation as an educational services
21 provider. Not the reputation as a product producer. But just
22 to look at these images and think of the University. That's
23 not how trademark law works. And again, this is not a
24 copyright case. It's about whether consumers are being misled
25 as to the source of Vintage Brand's products.

1 Now let me add some context. Let me start first
2 with Chad Hartvigson. Chad, who is here today, you'll hear
3 him testify. Chad is an entrepreneur. He's a former
4 professional baseball player, and he's a lifelong sports fan.
5 And, in fact, this isn't Chad's first time to Williamsport.
6 He was here in 1982 playing in the Little League World Series,
7 with a team from Washington State that achieved a historic
8 championship win over Taiwan, which was subsequently
9 documented in 30 for 30 ESPN documentary.

10 While Chad went on to play professional -- or
11 college baseball, he graduated with a degree in business, and
12 after graduating, he was drafted to play professional
13 baseball. When you hear Chad explain, that like many
14 professional baseball players, he started out at the lowest
15 level of the minor leagues. And he progressed his way up to
16 the highest level of the minor leagues, triple A baseball.

17 And you'll hear Chad explain that, unlike the folks
18 you see on t.v. playing in the big leagues who are making
19 millions of dollars, Chad, as a minor league baseball player,
20 barely made enough money to afford food. And so after he
21 retired from professional baseball, he was eager to put that
22 business degree to work, and he was eager to make it in
23 business.

24 So fast-forward to 2003. That's when Chad first
25 came up and founded his first apparel company called Prep

1 Sportswear, or Sportswear, Inc., is the full formal name. And
2 Sportswear was a first of its kind for many reasons. Prep
3 Sportswear is an online apparel company, and it was the first
4 to create a national database of youth sports leagues and
5 teams, like Little League baseball teams, and K through 12
6 schools across the country where parents, students, coaches,
7 fans of children playing in those leagues and on those K
8 through 12 teams to go online, find their school or find their
9 Little League, prepopulate it with templates so that fans and
10 parents could buy apparel for those student athletes.

11 So, for example, if you were to go on to the Prep
12 Sportswear website, you could search in the Williamsport Area
13 High School, find that school, preload it with templates, with
14 the school name, school colors, all customizable so that if
15 you have a son who plays on the baseball team or a daughter
16 who plays on the softball team and you want to order shirts
17 for those kids to wear during practice, you can do that with
18 easy-to-load templates and combinations and sizes that you
19 can't find anywhere else.

20 Now, Prep Sportswear was not only innovative in its
21 website platform, it was innovative in its manufacturing
22 process. You'll hear Chad explain that the traditional
23 methods of printing these apparel under the old regime really
24 was not cost effective. And so Chad and Prep Sportswear
25 created their own manufacturing and printing facility right

1 here in the US, in Kentucky, where all of its products were
2 printed on demand, only after a customer placed an order. And
3 under the old model, it was almost impossible for parents to
4 get small batch clothing like this.

5 So Prep Sportswear effectively created a new
6 industry within the apparel industry.

7 So through -- from 2003 until 2009, Sportswear
8 focused on the youth sports league and K through 12 business
9 model. And even at this -- even today, this continues to be
10 the bread and butter of the company. But in 2009, Sportswear
11 thought it would try something different, thought it would try
12 expanding its product offerings, and so it decided to start
13 offering licensed college logos printed on products, t-shirts
14 and sweatshirts. They decided to do basically what everyone
15 else was selling within that genre.

16 And so Prep Sportswear contracted with a company
17 called Licensing Resource Group, which through a series of
18 mergers became Learfield, which then became Collegiate
19 Licensing Company or CLC. And under this license, Sportswear
20 sold products featuring college's modern logos and included
21 all of their acquired officially-licensed statements on the
22 website and on the products themselves. And over time, Chad
23 came to find that the traditional collegiate licensing regime
24 just really wasn't all that compatible with Sportswear's
25 direct-to-consumer, print-on-demand business model. The old

1 licensing regime was really traditionally based on the
2 traditional method of brick and mortar stores, wholesalers,
3 retailers, each imposing their own mark-ups. And under the
4 traditional regime, the licensing industry really wasn't being
5 able to offer a lot of unique designs or color combinations or
6 sizes.

7 And so by about 2020, that relationship with the
8 CLC ceased, and those products are no longer offered.

9 And just to be clear, Prep Sportswear never offered
10 any products related to Penn State. That wasn't within their
11 portfolio.

12 But let me back up to 2017. That's when Chad
13 started considering an idea for Vintage Brand, and Vintage
14 Brand would be a new company, but it would be based on
15 something old, something very old. And that's historic sports
16 memorabilia.

17 Now, Chad has been a life-long sports fan and a
18 sports collector for a long time, and like many in the 1980s,
19 Chad got his start in sports collectables, collecting baseball
20 cards. Well, you'll hear Chad explain that his interest in
21 sports collectables has greatly expanded, and he'll describe
22 the fact that he has spent hundreds of hours meeting with
23 sports collectors, going to sports collectables trade shows,
24 searching on eBay, going to collectors' houses and sifting
25 through dusty boxes in garages and attics, all in the search

1 for rare sports collectables from the 1940s, 50s, 60s, decades
2 and decades ago. Why spend all this time doing that?

3 Well, once you see some of the artwork that
4 appeared on these sports collectables from the distant past, I
5 think you'll get a sense of how amazing some of this stuff is.
6 What you see here are examples from the Vintage Brand
7 collection of sports memorabilia with artwork related to Penn
8 State, and these are game brochures, and you can see that a
9 lot of these brochures are adorned with artwork that are
10 created by third parties that are cartoon-ish, really
11 impressive, often relating to two different teams.

12 Here are examples of stickers, decals, buttons
13 within Penn State's collection. And by the way, the button at
14 the bottom right should look familiar to you, because that's
15 where this shirt came from, the I like Penn State shirt.

16 Here are some examples of historic team tickets.
17 And these are particularly impressive for the artwork that
18 used to come on these old tickets. And of course these
19 tickets have information about the date that they've -- that
20 these games were played. But contrast that to anyone who has
21 gone to a modern sporting event with digital tickets. This
22 kind of artwork just doesn't exist on tickets anymore.

23 And so what was Vintage Brand's process? Well,
24 first, it was acquiring the complete collection of memorabilia
25 that it has, which, by the way, consists of more than 25,000

1 different items relating to hundreds of different universities
2 and pro teams.

3 At that point, Vintage Brand's founders took the
4 painstaking effort and process of enhancing or scanning the
5 artwork that appeared from that memorabilia. And then, went
6 through the painstaking process of enhancing those scanned
7 images to deal with things like wrinkles, smudges, and to make
8 them suitable for printing on new products, so enhancing for
9 clarity and for vibrant color. And then the final step is
10 offering those products with the enhanced artwork on things
11 like coasters, mugs, t-shirts, sweatshirts, canvas wall art,
12 all print on demand.

13 And Vintage Brand, as a startup, did not have its
14 own manufacturing facility from the outset. And so Chad had
15 Vintage Brand contract with his other company, Prep
16 Sportswear, which did have a manufacturing facility in
17 Kentucky to print all of Vintage Brand's products. You'll
18 hear Chad explain that now that Vintage Brand is more
19 established, it has its own manufacturing facility in
20 Nashville where it prints all of its products to this day.

21 You'll hear Chad also explain that the company
22 Vintage Brand is able to offer a huge array -- huge array of
23 design choices to consumers, as varied as the memorabilia
24 artwork that it derives from, and it's able to do so at an
25 affordable price, and it's able to sell those designs and

1 products to consumers, even if they don't sell very much. And
2 the reason it can do that is because it's direct-to-consumer,
3 print-on-demand.

4 The old way of doing business in this industry is
5 for retailers to acquire a large stock of inventory in
6 advance, and that inventory is then placed on a rack or it's
7 sold online. But because retailers often don't know which
8 designs are going to be favored most by consumers through
9 their purchasing behavior, it's inherently risky. And so that
10 necessarily causes retailers to limit the number of designs
11 that they offer, limit the number of color combinations, limit
12 the sizes that can be purchased. That's not a problem for
13 Vintage Brand and its business model of online,
14 direct-to-consumer, print-on-demand. It can offer a wide
15 selection of image variety, a wide selection of color
16 combinations, and a wide selection of sizes, everything from
17 infant all the way up to 6X.

18 So now you know about Vintage Brand and its
19 business model. Let's take another look at the Vintage Brand
20 website. And remember, one of the reasons -- primary reasons
21 I said that the evidence will show that consumers are not
22 confused as to who is responsible for Vintage Brand's products
23 is because of the context of the entire buying experience on
24 the Vintage Brand website.

25 What you see here is a screenshot of the Vintage

1 Brand website, and you have to keep in mind these are static
2 screenshots of a dynamic website, and so it's not quite a
3 one-to-one translation in terms of what you see here and what
4 the actual experience is on the website. But you see at the
5 top left, the Vintage Brand name and stylized V logo. The
6 Vintage Brand color scheme is black and white, and that
7 appears along with the name and logo on every page of the
8 Vintage Brand website.

9 At the top, the home page is organized with
10 hyperlinked categories of college, baseball, football,
11 basketball, Vintage athletes and more.

12 As you scroll down, there's arrangements of
13 different mocked-up product offerings to help consumers and
14 how they want to go shopping for Vintage Brand's products. So
15 one of the first cluster of product offerings that you see
16 here that consumers can hyperlink to expand the selections are
17 just a variety of top colleges with historic artwork, and in
18 this case, relating to the Auburn Tigers, Oklahoma Sooners,
19 Notre Dame Fighting Irish, Florida Gators, Nebraska Corn
20 Huskers, Ohio State, and Alabama.

21 So consumers can click on that link and shop
22 similar designs related to other universities. Consumers can
23 shop -- a popular option is two-team rivalries. So if your
24 favorite school is commonly-playing each year in a big rivalry
25 game, Vintage Brand has historic memorabilia designs related

1 to that theme you can shop for. You can isolate and look at
2 the entire directory of universities for which there's
3 historic memorabilia artwork on the Vintage Brand website, or
4 you can search by an individual at the University and find
5 artwork related to that University.

6 What you see here is what the web pages related to
7 Penn State artwork look like on the Vintage Brand website.
8 And just scrolling down here, you see that the way this is
9 organized is that Vintage Brand has digital mockups of a wide
10 variety of different like product types, coasters, wall art,
11 sweatshirts, t-shirts, things like that, and that those
12 different blank types are populated with mockups of the range
13 of different memorabilia artwork that is available on the
14 Vintage Brand website.

15 Now going back up to the top of this page, we see
16 again the Vintage Brand name at the top left, and we have the
17 disclaimers that are visible here and here. (indicating) And
18 there's disclaimers also at the bottom of the page.

19 Now remember, keep in mind, it's not even so much
20 that Vintage Brand has these disclaimers on its website. It's
21 that Vintage Brand is not silent on the issue at all, and that
22 Vintage Brand does not falsely proclaim to offer
23 officially-licensed merchandise, and it's the fact that Penn
24 State's licensees proclaim to offer officially-licensed
25 merchandise. And all of that combines to form the consumer

1 experience when purchasing these products.

2 If a consumer were to click on one of the
3 thumbnails and look at an individual product offering, you
4 might see something like this. (indicating) Again, Vintage
5 Brand's name is in the top left. If we zoom in on the product
6 description, you see something like this, (indicating) 1950
7 Penn State Nittany Lion's mug. And you'll hear from Chad
8 explaining his process of researching and attempting to date
9 these historic images. In this case, Chad and Vintage Brand
10 believe that this image first originated in 1950 on historic
11 memorabilia.

12 You'll see that there's yet again, another
13 disclaimer saying by Vintage Brand, not affiliated with or
14 sponsored by Penn State Nittany Lions. And then below that is
15 a description of the image itself. And it goes in to the
16 history of the Nittany Lion mascot.

17 And that's there because it's important to tell the
18 stories of these images, because that's what Vintage Brand
19 believes these images do, that they tell stories, that they
20 evoke a sense of nostalgia.

21 Now if a consumer places an order, those products
22 arrive at their doorstep with Vintage Brand packaging, what
23 you see with the sticker on the box and the packaging in the
24 top -- the bottom left. They arrive with Vintage Brand's name
25 on the products, like you see on the label at the neck and the

1 brim of the hat.

2 And so that's the Vintage Brand website, and the
3 indicators for that website as to why consumers are not
4 confused as to source -- the source of Vintage Brand's
5 products.

6 So let's now talk again about Penn State's
7 licensees.

8 So what you see here is an excerpt from the
9 contract between Penn State's licensing agent, CLC, and one of
10 CLC's licensees, Penn State's licensee, retail licensee, with
11 language requiring that licensees affix official --
12 official-license articles to all of its products that
13 officially-licensed statements be included with all
14 advertising and marketing. And at the bottom here, you see
15 some examples of the holographic stickers and labels with
16 unique serial numbers that those products come -- that are
17 attached to the products. Again, when I mentioned that
18 consumers can actually look up those serial numbers that they
19 can determine that their product is officially licensed. This
20 is an example from the college vault program of an officially
21 licensed product game tag that's affixed to the product.

22 And these are some examples from The Family
23 Clothesline. What you see on the left is right on the banner
24 of the storefront of the retail outlet at State College. They
25 proudly proclaim on the banner for all to see, Officially

1 Licensed Penn State Merchandise. There's a website address
2 there. Penn State clothes dot com. And of course at that
3 store, you'll hear from the proprietor of that store that all
4 of their products are related to Penn State. Their products
5 don't -- they don't offer products related to the University
6 of Alabama or other pro teams in the way that Vintage Brand
7 does.

8 On the right, you see a screenshot from their
9 website. And again, Officially-licensed appears in several
10 locations, and, in fact, on every single page of that website,
11 every single page, it says officially-licensed Penn State
12 gear. So again, if a consumer wants officially-licensed
13 merchandise, they don't have to guess because Penn State's
14 licensees make sure that consumers know that.

15 And it's no surprise that there is no evidence of
16 actual confusion. And in fact, Penn State will offer only a
17 single witness who will attempt to testify on this issue of
18 whether anyone is confused as to who is responsible for the
19 quality of Vintage Brand's products.

20 But you'll hear that this customer is not any
21 ordinary customer. In fact, she's not a customer at all. She
22 is the president of the largest alumni association Chapter for
23 Penn State University in Washington D.C. And you'll hear her
24 testify, via deposition, and she'll explain that in the summer
25 of 2022, she reached out to 100 different online businesses

1 offering products related to Penn State, 100 different online
2 businesses with essentially an identical e-mail. She was
3 soliciting free products related to Penn State that could be
4 raffled off at an alumni association event. And when
5 questioned about whether she visited the Vintage Brand
6 website, she said she did, and she said that she saw two logos
7 that she recalled seeing, and she was very firm about that.
8 One she described as the chipmunk logo, which is a lion head
9 profile. And it looks a little bit like a chipmunk. The
10 second one she described as a paw print logo. You'll hear
11 from Chad and you'll take a look at all of the screenshots
12 that you see from the Vintage Brand website. But you'll hear
13 from Chad, and he'll explain that neither of those modern
14 logos for Penn State were ever on the Vintage Brand website at
15 any time.

16 And in addition to this, the time frame that she
17 claims to have been on the Vintage Brand website, the Vintage
18 Brand web pages related to Penn State were not even live and
19 available to the public. You heard from Counsel during
20 opening statement that when Penn State brought this lawsuit,
21 Vintage Brand temporarily took those pages down. That was in
22 2021. Ms. Maffey claims that she was on the website for
23 Vintage Brand, looking at these pages, in the summer of 2022.
24 There is no evidence of actual confusion. And, in fact, this
25 is confirmed by the empirical scientific research that has

1 been conducted.

2 One of the witnesses you'll hear from is Dr. Tulin
3 Erdmen. Dr. Erdem is the chair of the marketing department at
4 New York University Stern School of Business. And she has a
5 PhD, and she is an expert in consumer behavior. She conducted
6 a scientific survey to assess consumer reaction to the Vintage
7 Brand website to determine whether consumers are being misled
8 in to believing that Penn State is the source of Vintage
9 Brand's products.

10 You'll hear Dr. Erdmen explain that consumers do
11 not believe that Penn State is responsible for the quality of
12 Vintage Brand products. There is no confusion as to source.

13 Now, Penn State will offer its own survey expert,
14 David Franklyn. You'll hear from David Franklyn and you'll
15 find that unlike Dr. Erdem, who has a PhD and is an expert in
16 consumer behavior, Mr. Franklyn has no formal training in
17 survey research. He has no PhD, and, in fact, he's a lawyer.

18 One of the other experts you'll hear from is
19 another defense expert, Dr. David Neal, and he was retained to
20 critique Mr. Franklyn's survey. Dr. Neal also is a PhD and an
21 expert in consumer behavior. And he'll explain that Mr.
22 Franklyn's survey is deeply flawed in his methodology; he
23 utilized a bad control; he distorted the commercial context,
24 in which consumers purchased Vintage Brand's products; and the
25 summation is his conclusions are invalid. Junk science in,

1 junk science out.

2 So as I wrap up my comments here, I refer back to
3 the old familiar addage, there are often two sides to every
4 story. You've just now heard from the other side. We're here
5 today because Penn State thinks that it has the right, the
6 trademark right to control all images that simply evoke
7 thoughts of the University, even when consumers are not
8 confused as to the source of those products. And again, this
9 -- this is not a copyright case. This is a trademark case.
10 And trademarks are designed and intended to protect consumers
11 from being misled as to who is responsible for the quality of
12 that -- of those products.

13 Ask yourself, do consumers intend to purchase
14 products put out by Penn State but are misled in to purchasing
15 products put out by Vintage Brand instead? That's what Penn
16 State's trying to prove. We say they aren't. Or do consumers
17 intend to purchase products put out by Vintage Brand and
18 that's what they get and that they know that those products
19 are put out by Vintage Brand?

20 Or perhaps it's a third option. Maybe consumers
21 don't even care who is responsible for the quality of Vintage
22 Brand's products. If a consumer does not care who is
23 responsible for the quality of Vintage Brand's products, that
24 consumer necessarily cannot be confused as to the source of
25 those products because source was never a consideration in the

1 first place.

2 I said before that the images that Vintage Brand
3 puts on its products are there to tell a story. Similar to
4 what Sports Illustrated has done in its Commemorative 25-year
5 Anniversary issue related to Penn State. The entirety of this
6 issue, which Sports Illustrated sells, presumably to Penn
7 State fans, for compensation, the entirety of this magazine is
8 related to stories about Penn State's football team. And just
9 because Penn State's name and logos appear within this
10 magazine, consumers aren't being misled in to thinking that
11 Penn State is responsible for the quality of this magazine.
12 That's how trademark law works. And that's no different than
13 this.

14 The artwork that appears at the center of these
15 t-shirts, even though the Penn State name is there, is not
16 doing trademark work. It's about Penn State. It's not from
17 Penn State. And that's the key trademark distinction.

18 At the conclusion of all the evidence, we think
19 that you'll reach that same conclusion. At the conclusion of
20 all of the evidence, we'll ask that you render a verdict in
21 the Defendants' favor. Thank you.

22 THE COURT: Thank you, sir.

23 Counsel, if you don't disagree, I think we'll take
24 a short recess at this point.

25 Ladies and gentlemen, Mrs. Rhinehart will escort

1 you out for a 10-minute recess. Court will rise.

2 (At 3:00., p.m. a recess was held.)

3 (At 3:16 p.m., the jury entered the courtroom.)

4 THE COURT: All right. We're back on the record
5 after a short recess. Plaintiffs' Counsel, are you ready to
6 call your first witness? Ms. Wheatley?

7 MS. WHEATLEY: Your Honor, we'll start by reading
8 the factual stipulations into the record.

9 THE COURT: That's fine. Go ahead. As modified by
10 the Court.

11 MS. WHEATLEY: As modified by the Court. And
12 Mr. Burkhardt will show the stipulations on the screen so the
13 that the jury is able to see the images.

14 THE COURT: Go right ahead.

15 MS. WHEATLEY: The parties, the Pennsylvania State
16 University, Vintage Brand, LLC, Sportswear, Inc., and Chad
17 Hartvigson stipulate to the following facts:

18 1. Vintage Brand, LLC, formed in September, 2017.
19 Vintage Brand's members, i.e., owners consist of co-founders,
20 Chad Hartvigson, Erik Hartvigson, and Michelle Young. Chad
21 Hartvigson owns 70 percent of Vintage Brand, while Erik
22 Hartvigson and Michelle Young each own a portion of the
23 remaining 30 percent. Vintage Brand has no W-2 employees.

24 2. Vintage Brand owns and operates a website,
25 Vintage Brand dot com, where consumers can purchase

1 print-on-demand apparel, drinkware, and other goods.

2 3. Vintage Brand owns a collection of sports
3 memorabilia, which consists of pennants, buttons, game
4 tickets, decals, brochures, patches, stickers, trading cards,
5 and programs bearing images from collegiate sporting events of
6 the past memorabilia.

7 4. Vintage Brand's business model consists of
8 selecting and scanning images or parts of images from its
9 collection of memorabilia and memorabilia owned by others and
10 printing those scanned images or parts of images on blank
11 products such as t-shirts, sweatshirts, hats, socks,
12 drinkware, and other items. These products are offered for
13 sale to customers across the United States through Vintage
14 Brand's website at Vintage Brand dot com.

15 5. From 2018 to 2021, Vintage Brand's website
16 included, among other things, a team page entitled Penn State
17 Nittany Lion's Vintage Designs on which it made available
18 merchandise featuring roughly 35 images related to Penn State.

19 6. Vintage Brand first sold a product bearing Penn
20 State-related images in May, 2018.

21 7. Sportswear, Inc., also called Prep Sportswear,
22 formed in 2005. Chad Hartvigson is CEO of Sportswear and owns
23 30 percent of the outstanding shares in Sportswear. The
24 remaining 70 percent are owned by 14 individuals.

25 8. Sportswear owns a manufacturing facility in

1 Kentucky. Because Vintage Brand did not have its own
2 manufacturing facility during the time relevant to this
3 lawsuit, Vintage Brand contracted with Prep Sportswear to
4 manufacture and ship all of the goods sold through Vintage
5 Brand's website and to provide customer service for Vintage
6 Brand.

7 9. Penn State was founded in 1855.

8 10. Penn State owns US Registration No. 1308610
9 for the word mark Penn State, which covers decals, stickers,
10 decorative wall plaques, drinking mugs, tankards, glasses,
11 cups, tumblers, pennants, banners, shirts, t-shirts,
12 sweatshirts, socks, hats, and nontextile wall hangings.

13 11. US Registration No. 1308610 was registered on
14 December 11th, 1984.

15 12. Penn State owns US Registration No. 5766698
16 for the word mark Penn State, which covers decorative magnets,
17 drinking glasses, cutting boards, fabric flags, hooded
18 sweatshirts, sweatpants, caps, being headwear, coasters, and
19 jigsaw puzzles.

20 13. US Registration No. 5766698 was registered on
21 June 4th, 2019.

22 14. Penn State owns US Registration No. 1315693
23 for the word mark the Pennsylvania State University, which
24 covers decals, drinking mugs, tankards, glasses, cups, and
25 tumblers.

1 15. US Registration No. 1315693 was registered on
2 January 22nd, 1985.

3 16. Penn State owns US Registration No. 5399989
4 for the word mark the Pennsylvania State University, which
5 covers hats, jackets, shirts, shorts, sweatshirts, and
6 t-shirts.

7 17. US Registration No. 5399989 was registered on
8 February 13th, 2018.

9 18. Penn State owns US Registration No. 5742516
10 for the word mark the Pennsylvania State University, which
11 covers decorative magnets and fabric flags.

12 19. US Registration No. 5742516 was registered on
13 May 7th, 2019.

14 20. Penn State owns US Registration No. 5305910
15 for the Pozniak Lion design mark which covers hats, t-shirts,
16 and sweatshirts.

17 21. US. Registration No. 5305910 was registered on
18 October 10th, 2017.

19 22. Penn State owns US Registration No. 1276712
20 for the University seal design mark, which covers decorative
21 magnetic stickers, decals, stickers, decorative wall plaques,
22 drinking mugs, tankards, glasses, cups, tumblers, pennants,
23 shirts, t-shirts, sweatshirts, shorts, and hats.

24 23. US registration No. 1276712 was registered on
25 May 8th, 1984.

1 24. Penn State owns US Registration No. 5877080
2 for the University seal design mark, which covers coasters,
3 ceramic mugs, fabric flags, banners of textile and hooded
4 sweatshirts.

5 25. US Registration No. 5877080 was registered on
6 October 8th, 2019.

7 26. Penn State owns US Registration No. 1350286
8 for Lion shrine design mark, which covers decorative magnetic
9 stickers, decals, drinking mugs, tankards, glasses, cups,
10 tumblers, pennants, shirts, t-shirts, sweatshirts, and hats.

11 27. US Registration No. 1350286 was registered on
12 July 23rd, 1985.

13 28. Vintage Brand owns US Registration No. 6029818
14 for the logo below for use in connection with online retail
15 store services, Vintage Brand.

16 29. Vintage Brand has sold and/or offered to sell
17 t-shirts, sweatshirts, hats, koozies, pennants, drinkware,
18 coasters, posters, magnets, wall art, socks, puzzles, and
19 cutting boards featuring images related to Penn State.

20 30. The Penn State-related images that have been
21 depicted on the merchandise offered and sold by Vintage Brand
22 include, but are not limited to the following images:

23 (Referring to display of images displayed to the
24 jury.)

25 The Vintage Brand website has numerous pages,

1 including A, a home page, the main landing page on the domain
2 www dot Vintage Brand dot com, B, team pages, secondary
3 landing pages with Vintage imagery related to specific teams
4 or institutions, and C, product pages, pages showing digital
5 mockups of potential product offerings utilizing artwork from
6 Vintage Brand's collection of memorabilia.

7 32. A representative screen capture of Vintage
8 Brand's Penn State Nittany Lion's vintage designs team page is
9 shown here. (indicating.)

10 33. The Vintage Brand website features specific
11 pages for each item offered for sale. An image of the top of
12 an example product page is shown here. (indicating)

13 34. Vintage Brand's Penn State Nittany Lions
14 Vintage designs team page contains text beneath the header
15 which reads: Vintage designs not affiliated with, licensed,
16 or sponsored by any college team or league. Vintage Brand's
17 product pages showing merchandise with Penn State-related
18 imagery contain text beneath the header which reads, By
19 Vintage Brand TM, not affiliated with or sponsored by Penn
20 State Nittany Lions.

21 35. Vintage Brand sold 1,269 products through the
22 Penn State Nittany Lion store on Vintage Brand dot com.

23 36. Vintage Brand received revenues from sales
24 through the Penn State Nittany Lion store amounting to
25 \$23,219.27.

1 37. Neither Vintage Brand, Prep Sportswear, nor
2 Chad Hartvigson have a license to use any of Penn State's
3 trademarks.

4 THE COURT: Very good. Thank you.

5 MS. WHEATLEY: I'm afraid another boring part, now
6 I'm going to move in to evidence our large group of exhibits
7 that the parties agree can be admitted.

8 THE COURT: Fine. You may do that.

9 MS. WHEATLEY: The Plaintiffs move to admit P-2,
10 P-4, P-6, P-8, P-10, P-12, P-14, P-16, P-18, P-20, P-23, P-24,
11 P-26, P-27, P-30, P-31, P-73, P-77, P-103, P-107, P-132,
12 P-137, P-140, P-142, P-147, P-149, P-170, P-172, P-174, P-175,
13 P-176, P-214, P-218, P-219, P-247, P-265, P-267, P-269, P-270,
14 P-272, P-274, P-277, P-279, P-280, P-283, P-85, P-287, P-289,
15 P-292, P-293, P-295, P-298, P-303, P-304, P-305, P-306, P-307,
16 P-308, P-309, P-310, P-326, P-341, P-342, P-354, P-355, P-363,
17 P-364, P-383, P-407, P-409, P-421, P-423, P-424, P-425, P-427,
18 P-429, P-431, P-432, P-434, P-435, P-437, P-438, P-440, P-442,
19 P-443, P-445, P-446, P-448, P-449, P-456, P-457, P-460, P-461,
20 P-462, P-463, P-465, P-466, P-467, P-470, P-471 P-472, P-482,
21 D-126, D-137, D-139, D-141, D-185.

22 That's all, Your Honor. So we would move to admit
23 those into evidence.

24 THE COURT: Objection from Defense Counsel?

25 MR. FETTERS: No objection, Your Honor.

1 THE COURT: Duly admitted. Thank you.

2 Ladies and gentlemen, the reading of the
3 stipulation and the recitation of the exhibits that Counsel
4 have agreed to is going to save us a great deal of time. I
5 thank Counsel for their courtesies and professionalism and
6 agreeing to the stipulations and of course agreeing to the
7 admission of those exhibits.

8 With that said, Plaintiffs ready to call their
9 first witness?

10 MS. WHEATLEY: Yes.

11 THE COURT: You may do so.

12 MS. WHEATLEY: Plaintiff calls Jackie Esposito to
13 the stand.

14 THE COURT: Ms. Esposito, come forward and be
15 sworn, please.

16 MR. FETTERS: Your Honor, may we have a brief
17 sidebar?

18 (A discussion was held at sidebar off the record.)

19 (The witness, Jackie Esposito, was sworn.)

20 COURTROOM DEPUTY: Go ahead and have a seat. The
21 chair does not move. Can I get you to state your full name
22 and spell your last name for the record.

23 THE WITNESS: My full name is Jacqueline Esposito.
24 It's J-a-c-q-u-e-l-i-n-e. The last name is Esposito,
25 E-s-p-o-s-i-t-o. But I go -- I'm known by Jackie.

1 THE COURT: Go right ahead, Ms. Wheatley.

2 MS. WHEATLEY: Thank you, Ms. Esposito.

3 DIRECT EXAMINATION

4 BY MS. WHEATLEY:

5 Q. Can you tell the jury where you live?

6 A. I live in State College, Pennsylvania.

7 Q. Are you currently employed full time?

8 A. I am not. I'm retired.

9 Q. Where are you retired from?

10 A. I'm retired from Penn State. I worked at Penn State for
11 35 years.

12 Q. And what was your job title at Penn State?

13 A. I was the University archivist and special projects
14 librarian.

15 Q. And when did you start working at Penn State?

16 A. October of 1986.

17 Q. And when did you retire from the University?

18 A. July 31st, 2021.

19 Q. Since you've retired, have you had any further
20 involvement with the University?

21 A. I do have involvement with the University. I have
22 speaking engagements for the alumni association for the
23 life-long living -- life-long learning organization. And I am
24 a site supervisor for the history department for interns that
25 work at historical societies.

1 Q. And so that I don't have to do that math, how long did
2 you work for Penn State?

3 A. 35 years.

4 Q. And what is your educational background?

5 A. I have a Bachelors of Arts in American political history
6 from St. Joseph's College in Brooklyn, New York. I have a
7 Masters of Arts from St. John's University in American
8 Political History and African studies, and I have everything
9 but a dissertation in higher education history at Penn State.

10 Q. And can you tell the jury what your job at Penn State
11 entailed?

12 A. The University archivist is in charge of documenting --
13 collecting, processing, and making accessible the documents of
14 the history of Penn State going back to 1855. So that would
15 include all sorts of documents, everything from Board of
16 Trustee's meeting minutes to faculty members' papers, student
17 organization papers, and it represents all of the 24 campuses,
18 the Hershey Medical Center, and the Dickinson Law school.

19 Q. And can you give the jury a size -- an idea of the size
20 of the University archive?

21 A. The University archive is about 25,000 cubic feet of
22 records, those nice white boxes sitting by -- all over the
23 courthouse here. It also is over a half a million
24 photographs. A little bit over -- the library itself is 7.5
25 million books. The archives itself has over a half a million

1 books, specifically related to Penn State history, as well as
2 artifacts and memorabilia, everything from Evan Pugh's barn
3 door to the shovels for various dedications of buildings.

4 Q. And how long has the University had an archive?

5 A. The University archive was established in 1904 in
6 anticipation of the 50th anniversary. So the 50th anniversary
7 would have been in 1905. The first archivist was a Penn State
8 history faculty member who began collecting materials. He
9 collected everything from General Beaver's documentations from
10 his time as a Civil War general and a member of the Board of
11 Trustees, as well as from his years of Governor of
12 Pennsylvania to all of the documents for the Commonwealth
13 history that are duplicated in the Penn State archives --
14 Pennsylvania State archives down in Harrisburg.

15 Q. And separate from your job at Penn State, do you
16 currently have a personal interest in the history of Penn
17 State?

18 A. I have written at least one popular book about Penn
19 State. I've also written numerous articles about higher
20 education implications about Penn State. I'm also very
21 interested in written articles about Penn State women and
22 about student organizations and the conflict -- the conflux of
23 town and gown. It's really important to understand the
24 history of State College by understanding the relationship
25 between town and gown.

1 Q. And I think you mentioned it, but -- if I may publish?

2 MR. HARMS: Yes.

3 BY MS. WHEATLEY:

4 Q. Ms. Esposito, can you tell the jury what this is? I can
5 bring it up.

6 A. No. I have it. It's the Nittany Lion, an Illustrated
7 Tail. It's the book that I wrote with a co-author about all
8 the various Nittany stories and legends that go back through
9 the history of Penn State.

10 Q. And can you tell the jury what's shown here on the cover?

11 A. The cover is the Nittany Lion shrine.

12 Q. And what sort of research did you conduct to write this
13 book?

14 A. In addition to conducting over 40 oral history interviews
15 with everyone from the class of 1940 class president and the
16 editor of the student newspaper to people -- to men who wore
17 the mascot -- they wore the suit. We also did interviews with
18 various historians and environmentalists about the stuffed
19 Lion. We also did research in the University archives and the
20 Pennsylvania State archives and in various other archives
21 about the role of mascots and the role of symbols at
22 universities.

23 Q. And what got you interested in writing a book about the
24 Nittany Lion?

25 A. I got tired of answering the question, what is a Nittany

1 Lion. Almost every single day in my job, somebody would call
2 and ask what is a Nittany Lion. And it was either what is its
3 gender, what type of Lion is it. Was it a cougar or a puma or
4 -- not an African Lion. But what, exactly, was the Nittany
5 Lion. What were the Nittany traditions. Who was Princess
6 Nittany. And I thought, mistakenly, that if I collected them
7 all and put them together and created an eight-page brochure,
8 I would never have to answer that question again.

9 Unfortunately, the eight-page brochure became a
10 265-page book. It also became an eight-page brochure. I did
11 stick to that. But it meant that I became the person to ask
12 when you had questions about Nittany Lion history.

13 Q. And here you are today.

14 A. And here I am today.

15 Q. And when was this -- your book on the Nittany Lion
16 published?

17 A. 1997. It is still the number one selling book for the
18 Penn State press.

19 Q. So as I think the jury has already seen in opening, some
20 of the trademarks in this case are representations of the
21 Nittany Lion. So I'd like to discuss him to start. So in
22 your time in Penn State archivist, is it fair to say your work
23 encompassed research related to the Nittany Lion?

24 A. Yes, it did. It encompassed that kind of research almost
25 every day.

1 Q. Now to begin, was Penn State always associated with the
2 Nittany Lion?

3 A. No. The college had two mascots prior to the Nittany
4 Lion. The first mascot was Old Coaly. It was a mule that was
5 purchased to help move limestone to build the original main
6 administration building. He was the mascot for about 40
7 years. His skeleton was kept after he died and is still on
8 display in the student union building today.

9 The second mascot was a pair of bull dogs that were
10 purchased to guard the ladies' cottage. They were purchased
11 with the thought that they would protect the ladies from
12 scandalous young men coming to visit. And it was the bull
13 dogs that were replaced by the Nittany Lion in 1904.

14 Q. Can you tell the jury how the Nittany Lion then came to
15 be Penn State's mascot?

16 A. In 1904, the Penn State baseball team was on an eastern
17 road trip. At that point in time, it meant they got on a
18 train and went to various different schools over the course of
19 a week. At the end of the road trip, they were at Princeton,
20 and they were being given a tour of campus. And Princeton has
21 the Princeton tiger. And the Princeton's students were
22 bragging about how strong the Princeton Tiger was. And Joe
23 Mason, who was the third baseman, bragged that back up at Penn
24 State, we had the Nittany Lion that had never been beaten in a
25 fair fight, so watch out, Princeton Tiger.

1 He went on to score three -- three times in the
2 baseball game, and in his career at Penn State, the four times
3 they played Princeton, they won three out of the four times.
4 He went back to campus and they -- most of the athletes lived
5 in a building known as the track house. They started talking
6 about it and writing it up and started advocating for the
7 Nittany Lion to become the mascot of the school. And that was
8 in 1904.

9 Q. Okay. And was there ever a real Nittany Lion?

10 A. There was a taxidermied lion that was on campus. It was
11 in a display of animals that was in the first floor of the
12 main administration building. It was on display. It had been
13 given to Penn State in the 1880s. It had been captured in
14 1859 and stuffed and taxidermied and kept by a family. It was
15 used like a rocking horse. And they donated it to Penn State
16 to be used as part of the zoology department to demonstrate
17 extinct animals.

18 The Nittany Lion was sent to two World's Fairs as
19 an example of an extinct animal. He was then sent to the
20 Carnegie Museum in Pittsburgh and was on display in an exhibit
21 for over 40 years. When that exhibit came down, the curators
22 of the Carnegie Museum contacted Penn State and asked them if
23 they wanted their lion back. And a faculty member in zoology
24 went with two graduate students to the Carnegie Museum and
25 brought the lion back.

1 Q. I'd like to put up on the screen demonstrative P-232,
2 which I believe --

3 MR. HARMS: No objection.

4 BY MS. WHEATLEY:

5 Q. Can we publish a picture for the jury to see?

6 A. That is the Nittany Lion that was in the old main museum,
7 and it was in -- on display at the Carnegie Museum. It is now
8 on display at the old sports museum on the second floor. It
9 has been conserved -- a conservator from the Smithsonian
10 Institution came up and conserved it. She found out that it
11 had been treated with arsenic originally. So it had to be
12 neutralized. And it had to have its mangy areas replaced with
13 fur. And the fur in the mangey areas is actually rabbit fur,
14 because if you do DNA testing, you want the real lion fur and
15 not the rabbit fur, and so that distinguishes that. There has
16 been DNA testing that proves that it's nearest relative is the
17 Colorado Mountain Lion.

18 Q. And during Mr. Fetter's opening, he showed a screenshot
19 of a little blurb on the Vintage Brand page about the Nittany
20 Lion.

21 A. Um-hum.

22 Q. And did you have any thoughts on that?

23 A. It was with the 1950s mug --

24 Q. Yes.

25 A. -- that was shown in the opening. And the description

1 with the 1950s mug was that Joe Mason was embarrassed and that
2 he -- there was no mascot. And neither one of those
3 statements are true. Joe Mason bragged. As, you know, most
4 athletes, when they're being taunted, he --

5 MR. HARMS: Objection.

6 THE COURT: Is there an objection?

7 MR. HARMS: Objection. Foundation. Personal
8 knowledge.

9 THE WITNESS: We have --

10 THE COURT: Hold on. Go ahead, Ms. Wheatley.

11 MS. WHEATLEY: Ms. Esposito is the University
12 archivist who has written a book on the history of the Nittany
13 Lion.

14 THE COURT: Objection noted. Overruled. I'll let
15 you explore. Go right ahead.

16 BY MS. WHEATLEY:

17 Q. Go ahead, Ms. Esposito.

18 A. Joe Mason was a Penn State student and a long-term alum,
19 and he actually tells his own story about the -- how the --
20 what happened in Princeton when the lion shrine sculpture was
21 dedicated in October of 1942. We have the transcript of that
22 in the archives.

23 And it doesn't reflect the story that's with the
24 1950s mug.

25 Q. Thank you, Ms. Esposito.

1 A. I'm sorry.

2 Q. No. Don't be sorry. And so this was sort of the
3 original Nittany Lion, what we have on the screen. Have there
4 been other versions of the Nittany Lion over the years?

5 A. Yes, there have. There have been other examples of the
6 Nittany Lion. There have been representations that included
7 an African Lion. There have been other representations that
8 have been done by student organizations.

9 Q. So I'd like to look at another one, demonstrative P-233,
10 which I understand is without objection.

11 MR. HARMS: No objection.

12 BY MS. WHEATLEY:

13 Q. All right. Can you tell the jury what we're seeing here?

14 A. We're seeing a paper mache lion that actually looks like
15 a pig. But it is a paper mache lion that was done by the
16 students, probably for the homecoming parade. That's usually
17 when they used a lot of paper mache. It's from 1910. And it
18 would have been -- the reason I'm thinking it's homecoming, is
19 because it has the letter S for state, and it has the
20 keystone, which were symbols used by Penn State back in 1910.

21 Q. Did Penn State ever claim trademark rights in this
22 version of the Nittany Lion?

23 A. No.

24 Q. All right. So I'd like to discuss now how the Nittany
25 Lion evolved to get to the lion shrine mark Mr. Finkelson

1 talked about in opening. Can we put up the demonstrative of
2 the Nittany Lion shrine logo? And, Ms. Esposito, I've got to
3 warn you, that when you touch the screen, it makes those
4 little blue dots.

5 A. I'm sorry.

6 Q. No, don't be sorry. I don't know how to make them go
7 away.

8 THE COURT: Mrs. Rhinehart will take care of that.

9 MS. WHEATLEY: Thank you very much.

10 THE WITNESS: I'll sit on my hands.

11 BY MS. WHEATLEY:

12 Q. Do you recognize this logo on the screen?

13 A. It's the logo that represents the Nittany Lion shrine
14 that was built on campus and dedicated in 1942.

15 Q. And the lion shrine that's on campus, I believe earlier
16 you had said this was a picture?

17 A. Yes.

18 Q. Does -- do physical versions of it exist anywhere else in
19 the Penn State system?

20 A. The full size lion shrine is only at University Park.
21 Every other location under the Penn State's purview has a
22 three-quarter size replica that sits either in the lobby or a
23 prominent place on campus.

24 In addition, the same sculptor who sculpted this
25 Lion created a model for replicas that are given out for

1 anniversaries and sold and marketed in stores, department
2 stores and stuff.

3 Q. The replicas for anniversaries you mentioned, what sort
4 of anniversaries are those?

5 A. They're given to employees when they've reached certain
6 landmarks, like 10 or 25 years. They're given for outstanding
7 alumni. They are usually made in stone and handed and given
8 as an award.

9 Q. And can you -- are you familiar with how the lion shrine
10 came to be built?

11 A. Yes.

12 Q. Can you tell the jury of how the idea for a lion shrine
13 statue first arose?

14 A. The towns people in downtown State College got tired of
15 having pep rallies on the corner of College and Allen --
16 that's a major intersection in town. One of the pep rallies
17 got particularly out of control. They had a big bonfire, and
18 it got lit with the wrong kind of fuel. And even the
19 quarterback got knocked down by the fumes for about a mile
20 down the street. And the townspeople went to the president of
21 the University and said you have to find a place on campus for
22 your students to have pep rallies. And the President of the
23 University put together a committee involving art faculty, the
24 president of the student class, the editor of the Collegian
25 newspaper and several other representatives to come up with a

1 place on campus where they could have a place for the students
2 to gather. They chose a place that was centrally located. It
3 would be by old Beaver Stadium, but -- which is now a parking
4 lot -- the Nittany Lion Inn, and rec hall, which was brand
5 new. It had been built in 1939. And once they decided a
6 location, they contracted with a sculptor who was known for
7 sculpting animal sculptures. And that was Heinz Warneke. He
8 was known in Pennsylvania because he sculpted the mother
9 elephant and its baby at the Philadelphia Zoo. It's still on
10 display if you go to the Philadelphia Zoo. They contracted
11 with Heinz Warneke, and he designed and built the lion shrine
12 sculpture.

13 Q. And who paid for the lion shrine sculpture?

14 A. The money for the lion shrine sculpture came from the
15 class of 1940 as a class gift.

16 When students started as freshman, they had a
17 deposit that was put into their accounts. That deposit was
18 held for all four years. And at the end of four years, they
19 could designate where the money went. In 1940, the students
20 voted on two options, either the shrine or a scholarship. And
21 they voted for the shrine.

22 Q. Now, in -- in 1942, were all of the members from the
23 class of 1940 able to attend the dedication of the shrine?

24 A. No. As a matter of fact, the class president, who was a
25 major person involved in selecting the animal and selecting

1 the sculpture was fighting -- building bridges in France
2 during World War II. There were significant people at the
3 dedication, and one of them was Joe Mason.

4 Q. And you mentioned that a sculptor named Heinz Warneke
5 built the shrine. Was anyone else involved in building the
6 shrine?

7 A. Heinz Warneke himself had an assistant. And the project
8 actually was part of a public work -- public arts work project
9 that the art faculty had students participate in. So you, as
10 a student, could go by the shrine as they were sculpting it.
11 They used a system called pointillism, where they would chip
12 away at the limestone. And you could help do that. It was
13 the second public art project on campus. The first was a
14 series of murals that were in the main administration
15 building. They were done by Henry Varnum Poor, who was a
16 well-known muralist who had done many works progress
17 administration projects in post offices, including one that
18 was down here in Williamsport.

19 Q. Now you mentioned, I believe, that Mr. Warneke was hired
20 by the University. Was he paid for his work?

21 A. He was paid \$5,400 to sculpt the shrine.

22 Q. And after he built the shrine, did Mr. Warneke do any
23 other work for the University on the shrine?

24 A. He designed the three-quarter replicas. He also designed
25 the smaller replicas for sale and for awards. He also came

1 back several years later when someone had taken a sledge
2 hammer to the shrine and knocked off the ear. He came back to
3 replace the ear. By that point, he was in his late 80s. And
4 they picked him up at the airport and had hoped to take him
5 straight to the Nittany Lion Inn so he could rest. But he
6 wanted to see his lion. And when he got to his lion, he
7 touched where the ear was broken and he cried. It's one of
8 those stories that, you know, touches me when I hear it.

9 We have pictures of him at the site when he's
10 touching the ear in the archives.

11 Q. And from your work in Penn State, do you have information
12 about how often the shrine is visited?

13 A. The shrine is the most heavily visited site at Penn
14 State. It is -- because it's open in the public, it's open
15 24/7, so people can go -- it's visited hugely during home
16 football games and the lines at graduation go for miles.

17 There was a survey done by Penn Live, which is a
18 news feed down in Harrisburg about 10, 12 years ago, and they
19 cited the Nittany Lion shrine as the second most visited site
20 in Pennsylvania; the first most visited site is the Liberty
21 Bell.

22 Q. And the two-dimensional version you have on your screen,
23 do you recall, from your time at Penn State, whether the
24 University licenses this image to be put on merchandise?

25 A. Yes, it did.

1 Q. And have there been various versions of the shrine
2 trademarked?

3 A. There -- various ways that you show this shrine. You can
4 show this shrine four-dimensionally, you know, in various
5 different positions.

6 Q. And I know you started in the 1980s. Was the University
7 using the shrine logo in the 1980s?

8 A. The University was using the shrine logo from the time it
9 was created in 1942, when it was dedicated in 1942.

10 Q. I'd like to transition to a different one of the
11 trademarks Mr. Finkelson showed in opening. Can you put up
12 the picture of the Pozniak lion logo? Ms. Esposito, do you
13 recognize this image?

14 A. This is the Pozniak lion.

15 Q. And who created this?

16 A. Ray Pozniak. He was a Penn State alum and a graphic
17 designer. He lived and worked in State College.

18 Q. Do you know when he created this logo?

19 A. The late 1970s, '78, '79.

20 Q. And do you know anything about Mr. Pozniak personally as
21 to why he might have created this design?

22 A. He was a very big fan. He was specifically a very big
23 fan of the wrestling club, and he felt that the athletics
24 department needed a good logo for the uniforms. And so he
25 designed it.

1 Q. And was this symbol used by Penn State in the late 70s
2 and 80s?

3 A. Mostly on intercollegiate athletic uniforms.

4 Q. And so was it the primary athletics brand during that
5 time period?

6 A. Yes.

7 Q. Do you recall, during that time period, whether the
8 University sold other apparel, like t-shirts or hats with the
9 Pozniak lion design?

10 A. Yes, it did.

11 MR. HARMS: Objection. Foundation.

12 MS. WHEATLEY: Should I respond, Your Honor?

13 BY MS. WHEATLEY:

14 Q. Ms. Esposito, were you at the University in the 1980s?

15 A. I started in 1985. '86. I'm sorry. October of '86. We
16 have documents in the archives that go beyond -- before that.

17 MR. HARMS: Best evidence rule, Your Honor.

18 THE COURT: No. The objection's noted. It's
19 overruled. The Court accepts the answer. You may continue.

20 MS. WHEATLEY: Thank you.

21 BY MS. WHEATLEY:

22 Q. Stepping back a bit, you mentioned that Ray Pozniak
23 created the logo and that he was a fan. How was the
24 University able to use the logo that he created?

25 A. He gave them permission while he was alive. And then

1 when he died, his son, Steven, who was his executor,
2 transferred the rights to the University.

3 Q. And I'd like to look at a document concerning that. Can
4 we pull up Plaintiff's Exhibit 407, which has been admitted.

5 Ms. Esposito, hopefully this is in your binder.

6 A. Um-hum.

7 Q. It might be easier to read there. It's sort of small on
8 the screen. But I'll give you a second to turn to that.

9 A. Thank you.

10 Q. Ms. Esposito, can you explain to the jury what this
11 document is?

12 A. It's an intellectual property purchase agreement. It's a
13 purchase agreement between Steven Pozniak and Penn State
14 University for the Pozniak lion.

15 Q. And on the first page, scrolling down a bit, the
16 paragraph labeled Section 101, do you see the definition for
17 purchased assets in this paragraph?

18 A. Purchased assets means all intellectual property or other
19 proprietary rights in, associated with, or related to the
20 Pozniak mark, including, but not limited to the Pozniak
21 registration, which is listed on Schedule A, all common law
22 rights in the Pozniak mark, any work protected by copyright
23 that consists of or features the Pozniak mark, and all
24 derivative works thereof, the domain name, cat on the hat dot
25 com, and all content published at such web address, the

1 domain, all of the forgoing, together with the goodwill of the
2 business in connection with the Pozniak mark has been used,
3 and all licenses of the Pozniak mark to third parties are set
4 forth in Exhibit B.

5 Q. All right. And I'd like to turn to Schedule A that's
6 mentioned here among the purchased assets.

7 Based on Schedule A, what was Penn State purchasing
8 from Ray Pozniak's son?

9 A. The Pozniak lion so they could use it on clothing.

10 Q. Thank you. And I'd also like to go to Exhibit B of this
11 agreement, which is on page 11. Are you able to see that on
12 your screen?

13 A. Yes.

14 Q. Now, based on this, you had mentioned that Ray Pozniak
15 had an affection for, I think, wrestling?

16 A. Um-hum.

17 Q. What groups were specifically included in this agreement
18 to have rights to use the Pozniak Lion?

19 A. The Penn State Alumni Association, the Lion Ambassadors,
20 which is a student group within the Alumni Association, and
21 the Nittany Lion Wrestling Club.

22 Q. Thank you. Now I'd like to turn to yet another Penn
23 State mark, the S Lion logo.

24 Do you recognize this logo?

25 A. Yes, I do.

1 Q. Is this a design that Penn State has used on merchandise?

2 A. Yes, it is.

3 Q. I'd like to start by talking about the block S that's in
4 the background of the logo. Is this -- is this something Penn
5 State has used as a symbol?

6 A. Penn State has used the block S for -- since about the
7 1880s. The Penn State name, the college has had its name
8 changed four times. In 1855, when it was founded, it was
9 founded as the Farmer's High School. That name was changed in
10 1862 to the Agricultural College of Pennsylvania. When the
11 Land-Grant Act and the Morrill Land-Grant Act were both
12 signed, Penn State was designated by the legislature of the
13 Commonwealth as the Pennsylvania State College, because it
14 would be the State College that would get the funds from the
15 Land-Grant Act. At that point in time in 1874, the S -- the
16 block S started being used as a symbol for Penn State. It was
17 done that way specifically to distinguish it from the
18 University of Pennsylvania, which used a block P.

19 The University of Pennsylvania, which is
20 traditionally an ivy league college, did not want to be
21 associated with the State College because the students at the
22 State College were not the caliber of the students at the
23 University of Pennsylvania. So there was a distinguishment
24 made between the two. And the name was changed for a fourth
25 time in 1953 to the Pennsylvania State University.

1 Q. Thank you. I'd like to look at another exhibit.
2 Actually, we will just use this one as a demonstrative,
3 Plaintiff's 231.

4 MR. HARMS: That's fine. No objection.

5 BY MS. WHEATLEY:

6 Q. Ms. Esposito, can you tell me, who is pictured in that
7 picture the jury sees on their screen?

8 A. This is Joe Mason. He is the third baseman that made the
9 initial boast about the Nittany Lion. He graduated with a
10 degree in mining engineering from Penn State and went to work
11 in the Pittsburgh area and in Kansas on specifically potash.
12 He actually has inventions under potash. He's wearing a
13 letter sweater he would have gotten from playing on the
14 baseball team. He lettered in baseball for four years, and
15 the lettermen would get those sweaters at the end of each year
16 when they were designated as lettermen.

17 Q. And so is this an example of how that block S was used
18 historically at Penn State?

19 A. Yes.

20 Q. And now switching back to the S lion logo, do you
21 recognize the lion that is shown here?

22 A. It's an African lion that was used initially when people
23 thought about the Nittany Lion, even though there were never
24 any African lions native to Pennsylvania.

25 Q. And so about when did Penn State switch to the -- to the

1 mountain lion?

2 A. They switched to the mountain lion in 1938/39, when they
3 changed both the mascot suit, as well as the lions that they
4 were using on material -- on publications and stuff. They
5 have continued to use the mountain lion when they do retro
6 days or go-back days. They do the same thing with the school
7 colors because the school colors were originally pink and
8 black. We would have been the pink and black mules under
9 Coaly or the pink and black bull dogs before the lion. But
10 the school colors were changed to blue and white.

11 And so when they do retro merchandising, they tend
12 to use pink and black and the African Lion as opposed to the
13 cougar.

14 Q. And so does Penn State continue to use this S lion on
15 that retro-style merchandise?

16 A. Yes.

17 Q. Now I'd like to ask you about the trademark Penn State.
18 When did the school's nickname become Penn State?

19 A. As I mentioned, the name was changed in 1874 to the
20 Pennsylvania State College. Almost immediately, it was known
21 as Penn State. It's similar to the University of Pittsburgh
22 is known as Pitt, and the University of Pennsylvania is known
23 as Penn.

24 Almost immediately, it was known as Penn State.

25 And it was very much to distinguish it as the college where,

1 as the -- as the Land-Grant Act requires, was open to the
2 citizens of the Commonwealth of Pennsylvania for all their
3 children.

4 Q. And from your review of the University records, has the
5 school been consistently referred to as Penn State since the
6 1800s?

7 A. In everything that I've seen, in documents, and in
8 talking with alums and in talking with, you know, people who
9 worked at the University, it was always known as Penn State.

10 On official documents, it's either the Pennsylvania
11 State College or the Pennsylvania State University, but in
12 nomenclature it's Penn State.

13 Q. And, Ms. Esposito, over the years when you've -- have you
14 introduced yourself to people who don't know you as working
15 for Penn State?

16 A. I have.

17 Q. Has anyone ever asked you what Penn State was?

18 A. No.

19 Q. And are you aware, starting from when you joined the
20 University in 1986, has the University consistently sold
21 merchandise with Penn State on it?

22 A. Yes.

23 Q. And when -- starting when you were at the University in
24 the -- in the late 1980s, did the University license the right
25 to use Penn State on apparel and merchandise?

1 A. The University had a licensing committee that was
2 established in 1982 that would look at what items venders
3 wanted to sell and approve those items based on the vendor
4 proposals.

5 Q. And you mentioned that the University's official name is
6 the Pennsylvania State University. When did that become the
7 University's official name?

8 A. 1953. It was changed specifically to reflect the amount
9 of research that was being done at the University. There's a
10 higher education rule about who gets to use the word college
11 and who gets to use the word university. And it has to do
12 with your research relationship.

13 Q. And from -- in your tenure at the University from 1986 to
14 2021, was merchandise with the Pennsylvania State University
15 on it consistently sold?

16 A. Yes.

17 Q. Shifting gears again, I'd like to get to the University
18 seal, if we can put that up on the screen.

19 Ms. Esposito, are you familiar with this trademark?

20 A. Yes. It's the University seal. It appears on -- the
21 actual seal is on diplomas and on official documents. This is
22 a replica.

23 Q. And when was this first adopted?

24 A. The seal itself was first adopted back when it was the
25 Pennsylvania State College. It was changed to the

1 Pennsylvania State University in 1953. The seal for the
2 Agricultural College of Pennsylvania was very similar to this.

3 Q. And what is the significance of the 1855 on the seal?

4 A. That's the founding date of the University.

5 Q. And why was the University seal shaped like this with the
6 scalloped edge?

7 A. Back in the day, when you did seals, they were literally
8 -- it was literally a piece of equipment that went on wax, and
9 you would push down on the wax, and the wax would scallop like
10 that. This replicates the scalloping of a wax seal. The wax
11 seal goes back to ancient Roman and Greek times. Perhaps the
12 most famous one is on, like, the Magna Carta or the
13 Declaration of Independence. It works that way. The seal is
14 very specifically used for important documents like diplomas
15 or deeds to peoples' houses.

16 It's also of significant importance in terms of
17 recognizing the validity of an institution.

18 Q. And during your time at Penn State, did your research
19 ever touch upon colleges or universities, other than Penn
20 State?

21 A. Always. We were always looking at what other colleges
22 were doing, specifically colleges that were considered our
23 comparison colleges, like Big Ten colleges. But we always
24 looked at what other colleges were doing in terms of what was
25 the best practices. And almost every college has a seal.

1 As a matter of fact, in order for you, as an
2 international student to come to Penn State, you have to show
3 your diploma with the official seal on it in order for you to
4 be accepted as an international student at Penn State.

5 Q. Thank you.

6 And now switching gears again, has the University
7 historically created its own designs and logos?

8 A. It created its own designs and logos back in the early
9 days and did so with its own print shop for decades up until,
10 you know, cooperate agreements, you know, got other companies
11 involved.

12 Q. Do you know -- do you have an idea of how far back the
13 printing shop dated?

14 A. The printing shop goes back to the 1890s, and it works
15 specifically with university offices to print up things like
16 class schedules and the course catalogs, as well as to print
17 up things like sporting event tickets. It still exists.

18 Q. And for tickets, how did the process work to create
19 tickets to sell to students historically?

20 A. If you were printing tickets back in the day, you would
21 use a printing plate. And the printing plate would -- would
22 print out blocks of blank tickets at the beginning of the
23 season. And then as the season went on, you would put in the
24 names of the opposing teams and their logos. You would put
25 the dates and you would put the seat markers.

1 And the reason you put the seat markers is so you
2 would have blocks. So you would have the away team have their
3 block of seats similar to the way we do, you know, whiteouts
4 now where there's blocks of seats. But the tickets were
5 literally sold in chunks that were called blocks.

6 Q. I'd like to look at an example. I believe Mr. Fetters
7 showed this in his opening when he was talking about
8 memorabilia. Can we put Defendant's Exhibit 126 up on the
9 screen.

10 What is the date on this ticket, if we look at the
11 upper right?

12 A. It's November 9th, 1929.

13 Q. Based on this, who created this ticket?

14 A. This would have been created by the University of
15 Pennsylvania, because this is an away game. They're playing
16 at Franklin Field. And so they would have created the blocks
17 within the dotted lines. And Penn State would have added the
18 Keystone versus, with the lion. And they would have had the
19 seat numbers and the stands and all of that would have been
20 printed and sent to Penn State. Penn State would then add
21 their part to it and distribute it to their students and
22 alums.

23 Q. And by their part, are you referring to the upper part
24 with the lion?

25 A. Where it says Penn State versus with the lion and the

1 football with the keystone.

2 Q. So would that be at the University print shop?

3 A. It would have been at the University print shop, yes.

4 Q. And would those have been sold to students?

5 A. They would have been sold to Penn State students and
6 alumni to go to the game at Franklin Field. And then they
7 would all sit in the same section, you know, at Franklin
8 Field.

9 Q. And the design behind the lion, what is the significance
10 of that shape?

11 A. The keystone is significant to the history of
12 Pennsylvania. Penn State -- the keystone, in Pennsylvania,
13 was -- Pennsylvania is considered the keystone state during
14 the American Revolution because it connected the northern
15 states with the southern states. So the keystone has been a
16 symbol in the Commonwealth of Pennsylvania since the 1770s.
17 Penn State used it because it was the Pennsylvania State
18 College and designated by the Commonwealth as such.

19 Q. Okay. And I'd like to introduce a second exhibit, a
20 similar one, I believe, was in Mr. Fetter's opening. It's
21 Defendant's Exhibit No. 185. This is actually -- an actual
22 ticket. May I approach?

23 THE COURT: You may.

24 BY MS. WHEATLEY:

25 Q. Ms. Esposito, what era is this ticket, and if we can

1 show, maybe the -- there we go -- on the screen, so the jury
2 can see it a little bit. What era is this ticket from?

3 A. It's November 25th, 1978. The parts of the ticket that
4 are not typed would have been the block of ticket that was
5 used until they had the game, the opponent in the game. In
6 this case, the block part where it's typed was actually one of
7 the earliest uses of computers on campus where they would
8 actually print these out and sell them.

9 So anything that you see that's -- looks like it's
10 typed, actually was computer printed.

11 Q. And who would have applied the Nittany Lion logo to this
12 ticket?

13 A. The ticket office would have asked the printing shop to
14 make these tickets.

15 Q. Thank you. And we can put that one away. And actually
16 I'll get it back.

17 MS. WHEATLEY: May I approach?

18 THE COURT: You may.

19 BY MS. WHEATLEY:

20 Q. Now, you mentioned working with the licensing committee,
21 so this may be a foregone conclusion. But in your time at
22 Penn State, did you ever have any responsibilities related to
23 the University's trademarks?

24 A. I served on the licensing committee for about 10 years,
25 from 1989 to about 1999, at which point the licensing

1 committee changed because of our relationship with CLC.

2 Q. And can you explain what the licensing committee did?

3 A. The licensing committee was a committee established by
4 the president of the University to review requests by vendors
5 to use the University name and symbols on merchandise. And
6 they would review the items -- initially we actually reviewed
7 the physical items. When that became too big of a job, we
8 started using photographs.

9 Q. And I'd like to introduce a document regarding the start
10 of that committee, Plaintiff's Exhibit 22.

11 MR. HARMS: Objection, Your Honor.

12 Unauthenticated, hearsay, and 403.

13 MS. WHEATLEY: Your Honor, 901.8, this qualifies as
14 an ancient record. 803.16, this is also a statement in
15 ancient document, so it's not hearsay.

16 MR. HARMS: It's unsigned, so it would not qualify
17 as an ancient document because there's not a sufficient
18 guarantee of trustworthiness, and it still is objectionable
19 under FRE 403, contains legal conclusions, legal argument,
20 etc.

21 MS. WHEATLEY: Your Honor, I believe Ms. Esposito
22 can authenticate where the record was maintained, and it does
23 not contain legal argument. It provides the historical
24 origins of Penn State's licensing of its marks and evidences
25 Penn States protections of its marks since that time.

1 THE COURT: Objection's noted. Overruled. Go
2 ahead.

3 BY MS. WHEATLEY:

4 Q. Now, looking at Exhibit P-22, Ms. Esposito. Do you
5 recognize this document?

6 A. It's a memorandum from Dr. John W. Oswald, who was
7 president of the university from 1970 to 1983. It's dated
8 August 5th, 1982. And it talks about establishing the
9 licensing committee.

10 Q. Okay. And is this document located in the University
11 archives?

12 A. Yes, it is. It's part of the president's papers.

13 MS. WHEATLEY: I'd like to move this in to
14 evidence.

15 MR. HARMS: Same objections.

16 THE COURT: Objection noted. Overruled. Duly
17 admitted. Do you wish to publish this, Ms. Wheatley or --

18 MS. WHEATLEY: Yes, I do.

19 THE COURT: You may publish to the jury.

20 BY MS. WHEATLEY:

21 Q. Ms. Esposito, can you explain to the jury what was going
22 on that caused this memorandum to be written?

23 A. In the late 1970s, there was a lot of -- there was a big
24 push to have individualized t-shirts, usually it came out of
25 bands who wanted t-shirts. It kind of changed the culture of

1 what students would wear to school, and so there were many
2 requests to Penn State to start using Penn State materials.
3 It was also the same time that the football team was becoming
4 very successful and the football team was going to numerous
5 championships and so it was a conflux of a change of fashion
6 as well as a change of the school's notoriety in athletics.

7 Q. And based on this -- this demand and this concern, did
8 the University take any steps to protect its trademarks?

9 A. The University did two things. They did a review to see
10 how many requests had been made prior to this date. And they
11 had a number of requests that had been made. And so they
12 determined that there needed to be an effort made to protect
13 -- to protect the trademarks, as well as to have a committee
14 review the requests.

15 Q. And looking -- if we could flip to page eight of the
16 memorandum. I'd like to look at some of the -- what marks we
17 were interested in.

18 Do you see the section titled Names and Marks to be
19 registered?

20 A. The University name, together with Penn State, PSU,
21 Nittany Lions, and the University seal would be registered as
22 trademarks with respect to appropriate categories of use.

23 Q. And so we know what Penn State is, the University's name,
24 is that the Pennsylvania State University?

25 A. State University.

1 Q. And university seal, what was that referring to?

2 A. It would have been the seal that we looked at just a few
3 minutes ago.

4 Q. And so these symbols were among the very first trademarks
5 the University sought to protect; is that fair to say?

6 A. Yes, yes, they were.

7 Q. And I'd like to go back to page one, and looking at the
8 history section, I think you mentioned they had cataloged the
9 request. Is this what you were referring to?

10 A. Yeah. The office of the senior vice president for
11 financing had cataloged 93 requests beginning in the year 1973
12 of intention to use its name and other identifying marks in
13 connection with commercial goods and services. There is a
14 summary attached to this memorandum. And they included
15 wearing apparel and alcoholic beverages, bicycle bags and
16 other things. And the response to these requests was varied
17 depending on the nature of the intended uses. The licensing
18 committee continued to have a standard of quality it would
19 enforce in the period of time I was on the committee.

20 Q. And the corporate seal that's being referred to here,
21 that there were requests to use, do you know what that's
22 referring to?

23 A. It's the seal that we looked at earlier.

24 Q. And the Nittany Lion, do you know what that refers to?

25 A. It usually refers to the Nittany Lion shrine. It can

1 also refer to the mascot. It depends on what use it's being
2 put to.

3 Q. So I'd like to look at an official record from this time
4 period or shortly after, after you've gotten to the University
5 related to how the University maintained its trademarks.

6 MS. WHEATLEY: We would like to introduce
7 Plaintiff's Exhibit 363.

8 MR. HARMS: No objection.

9 BY MS. WHEATLEY:

10 Q. If we could zoom in on the top half so Ms. Esposito can
11 see that.

12 Ms. Esposito, do you recognize this document?

13 A. It's a document from the United States Patent and
14 Trademark Office registering the trademark -- the Penn State
15 University seal on May 8th, 1984.

16 Q. And do you see the section titled Declaration. Who is
17 David Branigan?

18 A. He was the assistant treasurer at the time. He worked in
19 the Office of the Senior Vice President for Finance.

20 Q. Okay. And if you and -- was this declaration made under
21 penalty of perjury?

22 A. Yes, it was.

23 Q. And if we could go to actually page three to see -- if we
24 can zoom in on that. Did Mr. Branigan sign this?

25 A. He signed and dated it April 24th, 1990.

1 Q. Okay. Did this declaration, do you know what the purpose
2 of this declaration was?

3 A. It was to register the trademark for the mark for Penn
4 State.

5 Q. Was there any effort made to show -- made to show that
6 Penn State was using its trademarks?

7 A. Yes. You would always have examples. Whenever you
8 submitted a trademark registration, you would have examples.

9 Q. Okay. If we could scroll through, I'd like you to tell
10 me if you recognize the examples that were attached to this
11 declaration.

12 A. There is key rings and a knife, and then the bottom one
13 is stationery. Then you have some jewelry, you have note
14 cards, a portfolio. The one on top is actually really
15 significant because it's a chair. And while it looks like an
16 ordinary chair, when you've served at Penn State for 25 years,
17 you get to choose what chair you will get from the University,
18 and it's either a Captain's chair or a rocking chair, and it
19 has the seal on it. It's either in blue and white or it's in
20 elms from the historic elms on campus. When the historic elms
21 fall down, they take the wood and they make it into products.
22 And you get to choose, after you've been there for 25 years,
23 which one of those chairs you would like to have as a gift
24 from the University for your service.

25 And so that's what these chairs are. They're very

1 significant to employees because they have the seal.

2 Q. And do you recall that this was how the University was
3 using the seal on merchandise and other items in 1990?

4 A. Yes.

5 Q. All right. Now, I -- and is your work -- you were on the
6 licensing committee in 1990, correct?

7 A. Yes.

8 Q. So would you review those types of products?

9 A. We would review. We would meet every -- initially, we
10 met quarterly. Then we had to meet every month. And we would
11 review requests from venders for products. And we would
12 review them for the type of product they wanted to produce,
13 the quality of the product, how the symbols were being used,
14 and how it was going to be marketed, because oftentimes they
15 were marketed for short periods of time. And we would accept
16 those that met the standard that had been set in the
17 documentation we put forth for the vendors. Vendors always
18 had documentation as to what was expected of them. And if the
19 vendors didn't meet those expectations, their request was
20 denied.

21 Q. And I'd like to look at a document related to the -- to
22 the declaration we just looked at. Can we pull up Exhibit
23 364. If we can zoom in on this. Is this another document
24 from the Patent and Trademark Office?

25 A. It is. It's from the Patent and Trademark Office

1 recognizing that the patent that Penn State had requested was
2 approved.

3 Q. Thank you. I'm sorry. Trademark?

4 A. Yeah -- I'm sorry. It's from the Patent Office -- Patent
5 and Trademark Office. It's from the Trademark Statute.

6 Q. Thank you.

7 A. My mistake. I'm sorry.

8 Q. No. Don't. Don't. It's been a long day.

9 A. This -- this is actually publicly available on the Patent
10 and Trademark Office website.

11 Q. Thank you. So the Patent and Trademark Office accepted
12 Penn State's examples of how it was using the trademark?

13 A. Yes, it did.

14 Q. And if you can look at the last line here, what did the
15 Patent and Trademark Office convey to Penn State?

16 A. Your request fulfills the statutory requirements and has
17 been accepted.

18 Q. Thank you, Ms. Esposito.

19 And one more of these to look at. So that first
20 one was related to the University's seal.

21 MS. WHEATLEY: Can we introduce Exhibit 354?

22 MR. HARMS: No objection.

23 BY MS. WHEATLEY:

24 Q. Is this -- if we can zoom in to the top. Is this a
25 similar sort of declaration to the Trademark Office?

1 A. It is. It's for the mark Penn State. And it was
2 submitted December 11th, 1984 by the same David Branigan.

3 Q. Well, actually, scrolling to the end, and I see the date
4 there, when did he -- if you can scroll to the signature page.

5 A. It was submitted in April 24th, 1990.

6 Q. Was this a renewal of the trademark?

7 A. Yes.

8 Q. And scrolling through the examples of use attached to
9 this one, can you let me know if you recognize these from your
10 time at Penn State on the licensing committee?

11 A. Yeah. There are all kinds of memorabilia from cheering
12 horns to the unfortunate stuffed lion that you just showed.

13 Q. He looks a little bummed out.

14 A. He does look a little bummed out. I will say that there
15 were items that the licensing committee turned down. There
16 were two that come to my mind is particularly reasons that --
17 we had real good reason to turn them down. We had at one
18 point had a request to put the lady in the red shoes. She was
19 posed by the Nittany Lion, and all she had on was the red
20 shoes. And that was supposed to be a -- put on t-shirts. We
21 rejected that.

22 We also rejected a Penn State coffin, which was
23 blue and white and the -- blue on the outside, white on the
24 inside, and all of the -- the top of the coffin was Penn State
25 symbols. We rejected that, as well. They were considered

1 inappropriate.

2 Q. Understood. And to your knowledge, was this declaration
3 on the use of the trademark Penn State also accepted by the
4 Trademark Office?

5 A. Yes, it was.

6 Q. When you were on the licensing committee, were potential
7 licensees required to submit samples of their products?

8 A. Yeah. Initially they were asked to submit samples of
9 their products, and we actually kept all the samples until it
10 became a space consideration, at which point we went to asking
11 for photographs and would only ask for samples if we had
12 additional questions.

13 Q. And you mentioned quality restrictions on the merchandise
14 that was -- that was given permission to use the Penn State
15 trademarks. What sort of things would you look for for the
16 products?

17 A. The quality in the production of the product, the type of
18 materials that were being used, was it being fairly sourced,
19 and also were the images appropriate to the message for the
20 University.

21 Q. And do you recall why the University had rules in place
22 about how its trademarks were being used?

23 A. Because the University wanted to protect what people
24 believed were symbols of its heritage and its history. I mean
25 some of these images go back hundreds of years for Penn State.

1 And they're very tied to alums and fans in terms of how they
2 think about Penn State.

3 Specifically, the seal. I mean just recently in a
4 Penn State alumni magazine, there was an alum who was asking
5 about the seal. And then the Nittany Lion shrine is
6 absolutely affiliated with Penn State in peoples' minds.

7 Q. And in the time you were on the licensing committee, were
8 there ever times where people sold Penn State merchandise
9 without a license?

10 A. Yes, there were. We would -- we would -- the University
11 would send a cease and desist letter. If the cease and desist
12 letter wasn't sufficient to stop the sale, they would pursue
13 legal action.

14 Q. And generally, was a cease and desist letter sufficient?

15 A. 95 percent of the time.

16 Q. And I believe you mentioned, has -- in your experience on
17 the licensing committee, has the University generally, you
18 know, used throw-back or retro designs at times?

19 A. Um-hum, yes. They used retro -- students like doing
20 that. They like to use throw-back designs, especially when it
21 comes time for the anniversary. Because the University's
22 anniversary is February 22nd, 1855. That's when the charter
23 was signed. And so usually around that period of time, they
24 will -- they will do throw-back.

25 Q. And over the time you were at the University, did Penn

1 State's number of companies who were permitted to use the Penn
2 State trademarks grow?

3 A. Exponentially, especially once the football team got
4 really popular and the football team was going to
5 championships. And so by, you know, '82, '83, '86, when we
6 were having the good years, it grew exponentially, and that
7 was part of the reason, once we joined the Big Ten, that we
8 started working with CLC because the operation became
9 seismically large for the six-person committee that was
10 sitting reviewing these things.

11 Q. And when companies were granted permission to use a Penn
12 State trademark on merchandise, did Penn State receive any
13 sort of payment from those companies?

14 A. They usually received a royalty. The royalty was usually
15 between 7 and 10 percent.

16 Q. Ms. Esposito, have you, yourself, ever bought Penn State
17 clothing?

18 A. Yes. Multiple times in my 35 years at Penn State.

19 Q. I have to ask.

20 A. I know. I am -- when I'm doing public presentations, I
21 usually will wear Penn State clothing. And every baby that's
22 ever been born in the family has gotten Penn State clothing.
23 Yes, I do buy Penn State clothing.

24 Q. And about how many pieces have you bought, would you say?

25 A. Hundreds. There's at least 20 in my closet right now

1 that I swap out, depending on what I'm doing.

2 Q. If Penn State's mascot were still Coaly the mule, who you
3 mentioned earlier, would it make a difference to you in
4 wanting to buy Penn State clothing?

5 A. I think it depends on what the values are for Penn State.
6 You know, for me, Penn State's values are its education and
7 its research, and I work with a lot of students -- I've always
8 worked with a lot of students who believe that value, believe
9 what they're getting from Penn State. And so if we had gotten
10 to a point where it was going to be the black and pink mule,
11 and that was going to be what we were going to be, I think
12 that works. I mean the University of Southern California in
13 Santa Barbara has a banana sea slug as their mascot, you know.
14 I think that your loyalty is to your school, and Penn State
15 students and alums are extraordinarily loyal to what they
16 believe the values of the school are, in my experience.

17 Q. And so when you purchase Penn State merchandise, does the
18 University's reputation influence your purchase decision?

19 A. Yes.

20 Q. And do you recall some of the retailers who you've gotten
21 merchandise from?

22 A. I usually buy all of my Penn State merchandise from the
23 retailers downtown. I like to shop local. I'm not a big box
24 store shopper normally. Occasionally, I will go to Walmart.
25 But normally, I prefer to go to the local stores downtown.

1 Q. And have you ever bought Penn State clothing knowing it
2 wasn't sold or authorized by the University?

3 A. Not knowingly.

4 Q. And does it matter to you, as a consumer, whether the
5 University approves of the Penn State clothing and merchandise
6 you buy?

7 A. Yes, but part of that is my experience at the University
8 and my years at the University, but part of it also has to do
9 with the quality of the images.

10 MS. WHEATLEY: No further questions, Ms. Esposito.

11 THE COURT: Thank you. Defense Counsel care to
12 cross-examine?

13 MR. HARMS: Yes, Your Honor.

14 THE COURT: Go right ahead, sir.

15 CROSS EXAMINATION

16 BY MR. HARMS:

17 Q. Good afternoon. We haven't met before, have we?

18 A. Not that I know of.

19 Q. Not that I know of either.

20 A. I'm not good with faces, though, so.

21 Q. I'm Josh Harms. I'm one of the attorneys for the
22 Defendants. It's nice to meet you. I only have a few
23 questions for you today. This will be pretty quick.

24 Penn State developed a licensing program in 1983; I
25 believe that's correct?

1 A. In 1982, yes.

2 Q. 1982. Thank you. Is that also when the licensing
3 committee began?

4 A. Yes. It was chartered by the president to take care of
5 this issue that had become too big for the finance office to
6 handle.

7 Q. Um-hum. And then you joined the licensing committee in
8 1986, I believe, you testified to?

9 A. 1989.

10 Q. 1989?

11 A. My boss had been on it prior to that. The University
12 archivist was asked to be on the committee, specifically to
13 identify historical images.

14 Q. Understood. I believe you mentioned in your testimony
15 that in 1989, the licensing committee retained CLC; is that
16 correct?

17 A. The University retained CLC. It was part of the
18 agreement that they made with the Big Ten. The Big Ten had
19 already committed a contract with the CLC. As part of the Big
20 Ten, we were encouraged to join that.

21 Q. And that was in 1989?

22 A. Yes.

23 Q. You mentioned that reviewing products became too big of a
24 job for the licensing committee. Could you explain more what
25 you meant by that?

1 A. The number of vendors, the type of items, and sometimes
2 the short turnaround.

3 Q. Um-hum.

4 A. You know, for example, right now, the licensing committee
5 would be anticipating championship games and bowl games, and
6 you have a real short turnaround on things like that. And
7 when the committees's only meeting once a month, or, you know
8 -- actually, when it was meeting quarterly, we had to start
9 going to once a month. And then we would have ad hoc meetings
10 if we had to for short periods of time. So it was just the
11 number of vendors, the number of requests they we were
12 getting, it was much more than a six-person committee could
13 deal with.

14 Q. And about when did that start happening?

15 A. The late 90s, '96, '97.

16 Q. Can you estimate about how many licensees for retail
17 merchandise the University had at that point?

18 A. I could not, no. But it was -- it was in the thousands.

19 Q. It was in the thousands?

20 A. Yes.

21 Q. And you had received photographs --

22 A. Yes.

23 Q. -- of merchandise from --

24 A. And all those photographs are in the binders, in the
25 records, in the archives under the licensing committee's

1 record group.

2 Q. Understood. And that's what the licensing committee
3 would review --

4 A. Yes.

5 Q. -- for product quality?

6 A. Yes. If we had questions, we would actually ask to see
7 samples.

8 Q. Right. How often did you have questions?

9 A. Maybe one in four or five times. Maybe, you know, 10, 20
10 percent of the time.

11 Q. 10 or 20 percent of the time --

12 A. Um-hum.

13 Q. -- you were requesting to --

14 A. To see actual samples. When we stopped collecting
15 samples and we were looking at photos, when we would get
16 samples, we would send them back to the vendor.

17 Q. Understood. During your testimony, you mentioned
18 rejecting designs. I think you mentioned rejecting a coffin
19 design.

20 A. Um-hum.

21 Q. So in those situations, you were rejecting a design,
22 rather than the physical item, correct?

23 A. It was both. It was both the physical item and the
24 design.

25 Q. Okay.

1 A. It was deemed to be inappropriate at the time. Now I
2 don't know if it has gotten -- you know, if -- since I no
3 longer served on the licensing committee, if they have since
4 approved a Penn State coffin. But at the time we were
5 presented with it, we felt it was inappropriate.

6 Q. Understood. Just looking at how products appear in a
7 photograph, that doesn't really tell you about the actual
8 material though, does it?

9 A. No. The vendor had to provide specifications.

10 Q. Specifications. Can you please explain?

11 A. There were guidelines for every vendor as to what they
12 were to provide us so we could make decisions, and there were
13 specifications as to what kind of materials had to be used
14 and, you know, the quality of the materials.

15 Q. But you couldn't assess those materials in person?

16 A. No. But if we had a question, we asked for a sample.

17 Q. Okay. What would trigger you to have a question about
18 them?

19 A. Usually if the imprint on the shirt was blurry, or if the
20 image did not look like it should look, you know, if -- if
21 there were misspellings. I know that sounds ridiculous, but
22 we would get examples that had misspellings on them. And, you
23 know, then you contact the vendor and ask for things to be
24 fixed.

25 Q. So that would be an issue with the design that was

1 printed on the merchandise?

2 A. Yes.

3 Q. Okay. Is that also the quality -- did that also affect
4 the quality of the product, the tangible thing?

5 A. Not -- it wouldn't necessarily have to. I do not work in
6 retail. I was there to review the validity of the request
7 based on the images and on the use of the marks.

8 Q. Understood. Did the licensing committee focus on
9 licensing designs for Penn State fan apparel and fan
10 merchandise? Would that be a fair way to characterize it?

11 A. That's who the audience was. They were selling it to
12 Penn State students, Penn State alums. I assume that those
13 people are Penn State fans.

14 Q. Right. And this might be a silly question, but bear with
15 me. Why was the target market for these items Penn State
16 fans? Why wasn't it the public generally?

17 MS. WHEATLEY: Objection. Foundation.

18 MR. HARMS: I believe this is directly consistent
19 with something she talked about during her direct testimony.

20 THE COURT: I agree. Objection noted. Overruled.
21 Go ahead.

22 THE WITNESS: Could you repeat the question?

23 MR. HARMS: Yes.

24 BY MR. HARMS:

25 Q. Why would the Penn State fan merchandise and fan apparel

1 be marketed directly to Penn State fans and Penn State
2 supporters, rather than the public at large?

3 MS. WHEATLEY: I'll renew the objection but
4 understood.

5 THE COURT: Objection noted. Overruled.

6 BY MR. HARMS:

7 Q. You may answer.

8 THE COURT: Go ahead, ma'am.

9 THE WITNESS: The audience for the apparel were for
10 people who supported Penn State, Penn State students, Penn
11 State alumni. They tend to be Penn State fans. I wouldn't
12 imagine that the general public would buying Penn State stuff
13 if they weren't Penn State fans. My -- you know, my brother
14 lives in Brooklyn. And the Penn State material he has is
15 stuff I've sent to him because his sister lives in State
16 College, not because he's a Penn State fan, necessarily, but
17 because he's received it as a gift from somebody who is
18 associated with Penn State.

19 BY MR. HARMS:

20 Q. You mentioned during your testimony a moment ago that
21 you, yourself, own fan apparel?

22 A. I do.

23 Q. And you testified, I believe, that you own it because of
24 the reputation of Penn State?

25 A. Absolutely.

1 Q. Can you please explain more what you mean by reputation
2 in that context?

3 A. I personally believe in the value of the education and
4 the research that's done at Penn State. I personally believe
5 that students from working class families should have a
6 university to go to, that first generation students should
7 have a school that's theirs that they can go to that they can
8 have loyalty to. I believe in those things that are part of
9 the mission statement of Penn State. That's important to me.
10 It was important to me when I was hired at Penn State. It's
11 important to me as part of being an employee of Penn State,
12 even though I'm retired from Penn State. That still means a
13 great deal to me.

14 And when I purchase Penn State apparel to give as
15 gifts, it's because I'm proud of the things that Penn State
16 has done. Penn State is responsible for thousands of
17 inventions and innovations, and I am really proud of that
18 record of what Penn State has done since 1855.

19 Q. I appreciate that answer, Ms. Esposito.

20 Let's pull up Exhibit D-105. And we're not going
21 to publish this to the jury right now. And I apologize.
22 Actually, let's pull up P-22. Sorry about that.

23 Do you remember testify -- do you remember
24 testifying about this a moment ago, Ms. Esposito?

25 A. Yes. From -- from Dr. John Oswald. It's in the

1 president's papers in the University archives.

2 Q. Let's turn down to page three of this memo. And I want
3 to look at this heading one, Advantages of protection of
4 marks. I'm going to read 1-A. Enable the University to stop
5 the unauthorized use by any person or company of the
6 University marks, names, or symbols.

7 Did I read that correctly?

8 A. Yes.

9 Q. And there are a few sub points below 1-A that I'd like
10 you to read to yourself. Please let me know when you've done
11 that.

12 A. (The witness complies.) Okay.

13 Q. Does any of this mention consumer confusion, confusion
14 about the source of products?

15 A. It's -- stops such use on goods or services for which it
16 is not authorized by a license agreement. I don't know -- I
17 don't understand what you're leading toward.

18 Q. Were you on the licensing committee when this memo was
19 issued?

20 A. I was not. I was not even working at Penn State until
21 1986. My boss was, and when he decided to step down from the
22 licensing committee, I was appointed to the licensing
23 committee because we had -- the president's office felt there
24 needed to be a representative from the University archives on
25 the committee to protect the University's historical images.

1 Q. We talked a moment ago about -- we can take this exhibit
2 down. We talked a moment ago about Collegiate Licensing
3 Company, CLC, and you testified that that relationship with
4 the University began in 1989, I believe. Is that correct?

5 A. Yes.

6 Q. Let's pull up Exhibit D-105. This won't be published.
7 And let's scroll down a little bit. Ms. Esposito, I'd like
8 you to read this first full paragraph of this letter to
9 yourself, and let me know when you've done that.

10 A. (The witness complied.)

11 MS. WHEATLEY: I'll object to using this exhibit
12 with this witness for lack of foundation. Hearsay.

13 MR. HARMS: Have you finished reading the first
14 paragraph of the letter, Ms. Esposito?

15 THE WITNESS: This is from Michigan State. This is
16 not from Penn State.

17 THE COURT: Well, I think the question is have you
18 finished reading the first paragraph?

19 THE WITNESS: I've read the first paragraph, yes.

20 THE COURT: Mr. Harms, ask your next question.

21 MR. HARMS: Thank you.

22 MS. WHEATLEY: I will renew the objection to asking
23 the witness about a letter from Michigan State.

24 MR. HARMS: It's a letter on behalf of Penn State
25 and Michigan State and all the other schools that CLC

1 represents.

2 THE COURT: I'll let you explore this. The
3 objection's noted. Overruled. Go ahead.

4 BY MR. HARMS:

5 Q. You see the text here that says, On behalf of the
6 colleges that we represent. Correct?

7 A. Yes.

8 Q. And if we scroll up to the top of the letter, we see this
9 is from the Collegiate Licensing Company, and it's dated May
10 3rd, 1991, correct?

11 A. Yes.

12 Q. And would the license -- the colleges that the Collegiate
13 Licensing Company represents at that time include Penn State?

14 A. We just joined the Big Ten in 1991.

15 Q. And you've testified earlier that the relationship
16 between Collegiate Licensing Company and Penn State began in
17 1989, I believe?

18 A. We joined the Big Ten. Part of the Big Ten -- joining
19 the Big Ten meant contracts with other corporations that were
20 part of the Big Ten, and Collegiate Licensing was one of
21 those. We joined the Big Ten in 1991. Most of the other
22 contracts were after 1991. Is that --

23 Q. I suppose the contract between the University and CLC
24 specifically, not the contract between the University and
25 other sub licensees. I believe you had testified that that

1 was 1989.

2 A. That was my understanding, yes. If it was earlier, I
3 apologize for my mistake.

4 MR. HARMS: Your Honor, I'd move to admit this
5 Exhibit, D-105.

6 MS. WHEATLEY: Objection. Foundation. Relevance.

7 THE COURT: What is the relevance of this?

8 MR. HARMS: It goes --

9 THE COURT: Where are you going with this,
10 Mr. Harms?

11 MR. HARMS: It goes on to describe the official
12 label. If you look at the label marketing concept, under such
13 matters that are going to be explored in this case, perhaps
14 not with this witness for too long, but later in the case.

15 MS. WHEATLEY: Objection. Hearsay. This has not
16 been authenticated in any way. It is not from anyone involved
17 in this case.

18 MR. HARMS: It's a statement by a party agent. And
19 there was no authenticity objection.

20 MS. WHEATLEY: We objected based on hearsay. And
21 also, I don't think there's been any evidence that this was a
22 party agent, that this was on behalf of Penn State.

23 THE COURT: Is it a party agent? CLC?

24 MR. HARMS: And it says the colleges that we
25 represent, and it's May of 1991.

1 MS. WHEATLEY: There has been no witness who has
2 testified to any of the facts that Mr. Harms is asserting.
3 This is not a University -- Ms. Esposito has not been able to
4 authenticate this document. I don't see how this can come in
5 to evidence.

6 THE COURT: Yeah. I'm inclined to agree. I will
7 disallow it. Objection's sustained.

8 MR. HARMS: That is all right. We can move on.

9 BY MR. HARMS:

10 Q. Let's go to Exhibit D-28. This will be my last few
11 questions for you, Ms. Esposito.

12 MR. HARMS: I don't believe this has been admitted
13 yet. I don't think there is an objection, Ms. Wheatley?

14 MS. WHEATLEY: No.

15 THE COURT: What's the Exhibit Number?

16 MR. HARMS: D-28.

17 THE COURT: D-28?

18 MR. HARMS: Yes, Your Honor.

19 MS. WHEATLEY: No objection, provided Ms. Esposito
20 is familiar with it.

21 THE COURT: Let's start there.

22 BY MR. HARMS:

23 Q. Ms. Esposito, have you seen this document before?

24 A. I've seen documents similar to this.

25 Q. You've seen documents similar to this, the Penn State

1 brand book?

2 A. Yes.

3 MR. HARMS: I would move to admit it, Your Honor.

4 MS. WHEATLEY: I would object to asking
5 Ms. Esposito about this document if she hasn't seen it. I
6 have no objection to asking a witness who is familiar with it
7 about it.

8 THE COURT: Do you want to lay more of a foundation
9 with this witness, Mr. Harms? Go ahead.

10 MR. HARMS: Yes, Your Honor.

11 BY MR. HARMS:

12 Q. How -- in what context have you seen this document
13 before? Have you seen it on Penn State's website?

14 A. I have seen versions of the visual identity standards as
15 part of the licensing committee and as part of the
16 documentation in the archives of how vendors and users are
17 expected to use symbols related to the University. I don't
18 necessarily believe I've seen this one in particular. But
19 there have been versions of this.

20 Q. And do you understand this to be a version of what you
21 were just describing, a later version, perhaps?

22 A. Definitely a later version.

23 MR. HARMS: Your Honor, I would move to admit.

24 MS. WHEATLEY: Your Honor, if this was after
25 Ms. Esposito's time at Penn State, I don't think it's fair to

1 ask her to testify about it.

2 MR. HARMS: And, Your Honor, I would also note that
3 there were no objections to this exhibit when it was
4 identified.

5 THE COURT: They also didn't know which, I think,
6 witness was going to be explaining it.

7 What else -- what else do you have -- what else do
8 you have in terms of this exhibit in regards to questions for
9 this particular witness?

10 BY MR. HARMS:

11 Q. Ms. Esposito, earlier you talked about the athletics
12 mark.

13 A. The Pozniak mark?

14 Q. The athletics mark. I believe it's the modern mark.
15 It's a side profile of the Nittany Lion that's used for the
16 Penn State athletics teams.

17 A. I talked about the Pozniak mark. I haven't talked about
18 any other mark.

19 Q. Is there another mark that the Penn State teams use
20 currently that's not the Pozniak Lion?

21 A. Penn State, just within the last two weeks, changed their
22 marking. I don't know what specific mark you're talking
23 about.

24 Q. Have you heard of the chipmunk mark?

25 A. I have, yes. I've heard that derogatory name used.

1 Q. And I apologize. I don't mean to use it in a derogatory
2 manner.

3 A. No. You're not the only one. It was widely referred to
4 as the chipmunk mark. Yes, I am familiar with the chipmunk.

5 Q. And would you please describe that?

6 A. It's a lion face with puffed cheeks. And that's why it
7 was referred to as the chipmunk, because of the puffed cheeks.

8 Q. And that's considered to be the Penn State athletic
9 trademark, correct?

10 A. It was used by Penn State athletics for a number of
11 years. I don't know that it's still used by Penn State
12 athletics.

13 Q. During that period of use, was it designated as the
14 athletic trademark?

15 A. Not -- I don't know if that was its sole designation.

16 Q. Okay. What about the lion and shield design, I'll call
17 it. Are you familiar with that logo?

18 A. A lion's face in the shield?

19 Q. Yes.

20 A. For Penn State or -- I mean specifically for Penn State?

21 Q. Yes. Yes. For Penn State. Are you aware of Penn State
22 having a logo that it uses that is a lion in a shield?

23 A. I've seen lots of images in publications at Penn State,
24 starting in the 1880s when the first yearbook was published.
25 There have been many versions of lions, lions and shields,

1 lions and keystones. You'd have to be a whole lot more
2 specific.

3 Q. This would be the modern academic trademark that Penn
4 State uses, the lion in the shield.

5 A. I would need to see it. I'm sorry.

6 MR. HARMS: No further questions, Your Honor.

7 THE COURT: Thank you. Any redirect?

8 MS. WHEATLEY: Just briefly.

9 REDIRECT EXAMINATION

10 BY MS. WHEATLEY:

11 Q. Ms. Esposito, when you reviewed products as part of the
12 licensing committee at Penn State, did you take your job
13 seriously?

14 A. I took every day of my job seriously. I was responsible
15 for the University documents. I was responsible for the
16 University's history. I'm the person who was asked to speak
17 for those documents and to protect those documents, and to
18 make them accessible -- as accessible as possible. I took my
19 job extraordinarily seriously.

20 Q. And did you take the quality of Penn State's products
21 that had Penn State symbols on them seriously?

22 A. Absolutely. It was very important to me, and what people
23 were seeing represented Penn State. It's still very important
24 to me. When I do presentations, when I do workshops, I always
25 talk about the integrity and the value of Penn State and what

1 it has done in 165 years. It has not been perfect, every one
2 of those 165 years. But it has done a whole lot for the
3 Commonwealth that it can be very proud of. And when people
4 look at the Penn State name and logos, that's what most alums
5 that I've met in my lifetime see when they see that image.

6 MS. WHEATLEY: Thank you very much, Ms. Esposito.
7 No further questions.

8 THE COURT: Any recross examination?

9 MR. HARMS: No, Your Honor.

10 THE COURT: Ms. Esposito, thank you very much for
11 your testimony. You may stand down with the thanks of the
12 Court.

13 Unless you have a very short witness, I think this
14 is a good time to recess, Mr. Finkelson?

15 MR. FINKELSON: Agree, Your Honor. I think our
16 witness will be too long for that, and it's been a long day
17 for everyone.

18 THE COURT: Indeed.

19 Ladies and gentlemen, you've heard the first day of
20 testimony. Again, please don't discuss this case amongst
21 yourselves or with anyone else, other than if you return home
22 tonight to tell people that you are associated with that you
23 have been called to jury duty. You're serving as a juror in a
24 federal case, and you can tell them generally what the case is
25 about. That's it.

1 I'll have you back tomorrow ideally by about 9:15.
2 You're going to assemble in the jury assembly room on the
3 second floor as you did this morning. And by 9:30, you should
4 be up in the jury room and we'll be ready to begin testimony
5 for tomorrow. So Court will stand in recess, then, until 9:30
6 a.m., Wednesday, November 13.

7 If you want to escort the jury out, please.

8 (At 4:56 p.m., the jury left the courtroom and were
9 excused for the day.)

10 THE COURT: So, Ms. Wheatley, Mr. Finkelson, where
11 are we going to go tomorrow?

12 MS. WHEATLEY: I believe we will hear from
13 Ms. Petulla and Mr. Howell. We may play some of our
14 designated depositions.

15 THE COURT: I missed the last part. I'm sorry.
16 Say it again.

17 MS. WHEATLEY: Ms. Petulla, Mr. Howell, and we may
18 play some of our designated depositions.

19 THE COURT: What about Ms. Gummo?

20 MR. FINKELSON: I don't think, Your Honor, we will
21 get to Ms. Gummo tomorrow. If we have Mr. Howell,
22 Ms. Petulla and the depositions. I think it will be likely
23 that Ms. Gummo would probably be pushed to the following day.

24 THE COURT: So how long is Ms. Petulla's testimony?

25 MR. FINKELSON: Quite long. Mr. Howell is

1 considerably shorter.

2 THE COURT: When you say quite long, give me a
3 flavor of what quite long is.

4 MR. FINKELSON: I'll let my colleague, Ms. Wheatley
5 --

6 THE COURT: Oh, Ms. Wheatley.

7 MS. WHEATLEY: I think it could easily take three,
8 three-and-a-half hours just because of the -- establishing use
9 and that evidence.

10 THE COURT: So it will take the morning into the
11 afternoon?

12 MS. WHEATLEY: I think quite possibly.

13 THE COURT: What sort of cross examination do you
14 have for Ms. Petulla? Who is going to examine?

15 MR. FETTERS: I will be cross-examining. It
16 depends on the scope of the subject matter. But I would
17 imagine it will be much shorter. An hour, at most.

18 THE COURT: Do you really need to be that long?
19 Why is she that long?

20 MS. WHEATLEY: Well, she goes through the trademark
21 registrations and the evidence of use. And she talks about
22 the University's quality control. I'm going to do my best. I
23 think some of that was taken care of today, so I'm going to do
24 my best to --

25 THE COURT: That's -- well, that's what I'm

1 wondering. All right. Well, do the best that you can. And
2 Mr. Howell, what is he going to tell me. He's from CLC.

3 MR. FINKELSON: He's from CLC, Your Honor. I
4 suspect that Mr. Howell, on direct, will be less than an hour,
5 maybe 45 minutes.

6 THE COURT: Who is going to cross-examine?

7 MR. HARMS: Me, Your Honor. And the cross will not
8 be very long.

9 THE COURT: And you want to play some depositions?

10 MR. FINKELSON: We do.

11 THE COURT: These are video depositiosns, I
12 presume.

13 MR. FINKELSON: They are, Your Honor. We've
14 significantly reduced the deposition lengths. So we exchanged
15 new designations with the other side over the weekend. We're
16 under two hours all in on all of the depositions that we're
17 playing in our case in chief. So I think it's an hour and 50
18 minutes --

19 THE COURT: So who are we hearing from tomorrow?

20 MR. FINKELSON: So tomorrow you're going to hear --
21 we'll decide on the order this evening. But tomorrow you will
22 hear from both Ms. Petulla and Mr. Howell. And then you will
23 most likely hear video testimony.

24 THE COURT: Right, the video.

25 MR. FINKELSON: If we can get Ms. Gummo on, we will

1 certainly try. That's the next in the row for us. That will
2 leave two witnesses for us, Your Honor, for Thursday.

3 THE COURT: But just who am I hearing by way of
4 video deposition tomorrow?

5 MR. FINKELSON: Oh. It is -- it is -- we have
6 four. One is Erik Hartvigson, one is Chad Hartvigs. On, one
7 is Michelle Young, and the other is Ms. Maffey, who was
8 referred to today. Those are the four that we are intending
9 to play tomorrow, depending on time. And then there's one
10 other deponent that we're still making decisions on,
11 Mr. Delong.

12 THE COURT: And then you might get to Ms. Gummo is
13 what you're telling me.

14 MR. FINKELSON: We may get to Ms. Gummo. We're
15 certainly going to try. Certainly if the cross examinations
16 are relatively short, we would get to Ms. Gummo, and we'll
17 disclose her to the other side tonight, that she'll be a
18 witness tomorrow. And then that will leave Mr. Franklyn --

19 THE COURT: And so if you don't put Ms. Gummo on
20 tomorrow, she would role into Thursday, the 14th.

21 MR. FINKELSON: She would, Your Honor. And then no
22 assurances as to the order as between Mr. McGrath and
23 Mr. Franklyn. Those would be our two final witnesses. I
24 think Mr. McGrath will be relatively short. Mr. Franklyn has
25 to take the time to walk the jury through the survey, so that,

1 I expect, will be a little bit longer.

2 It's our current expectation, Your Honor, that, you
3 know, we'll rest our case either end of day Thursday, probably
4 more likely sometime early on Friday. But -- but resting on
5 Thursday is not out of the question if we continue to move at
6 the pace we're moving.

7 THE COURT: Very good. What -- may I ask, you
8 have, and I appreciate this, you've listed a number of the --
9 I want to describe them as sort of business records custodians
10 for CLC, Internet archives, an individual from San Francisco,
11 a Mr. Frank White, who is an Internet archivist, I guess,
12 Garnett Lee for authentication purposes. Are these people
13 going to be called, do you think? Is there going to be a need
14 for that, or have you come to stipulations on this?

15 MR. FINKELSON: I think we've come to an agreement
16 on most of the exhibits that would have required that. And
17 then Your Honor dealt with the way back machine issues. I
18 think we have one potential authentication witness. We have a
19 sweatshirt that has the Pozniak lion on it. And based on the
20 meet and confer last night, my understanding is that the
21 Defendants are insisting that we put on an authenticating
22 witness. That authenticating witness would be our client,
23 Mr. Dulabon, whose sweatshirt it is. That seems unnecessary,
24 but if the other side wants us to do that, we can put
25 Mr. Dulabon on the stand to do that. And we would probably do

1 that tomorrow if we can't reach an agreement to avoid that
2 tonight.

3 THE COURT: All right. Well, do what you can with
4 that. All right. Very good.

5 So with that -- thank you, Counsel. So with that
6 in mind, the Defense has to assume that you may very well
7 commence your case Friday. So you're going to have your
8 witnesses around for that purpose. No reason to think it's
9 any earlier than that, I think, once the path has been
10 chartered here.

11 I'm looking at you, Mr. Fetters, but I mean to
12 everyone.

13 MR. FETTERS: Yes, we would be ready to commence
14 Friday once the Plaintiff rests.

15 THE COURT: All right. So we'll circle back to
16 you, then. We'll stand in recess until tomorrow, which is
17 Wednesday, November 13, at 9:30 a.m. Court will rise.

18 (At 5:03 p.m. the proceedings were concluded.)
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CERTIFICATION

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